(1)

No. 97-5737-CFX Title: Sandra K. Forney, Petitioner
v.
Kenneth S. Apfel, Commissioner of Social Security

Docketed: August 27, 1997 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Aug 25 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 26, 1997)
	Sep 17 1997	Order extending time to file response to petition until October 27, 1997.
	Oct 28 1997	Order further extending time to file response to petition until November 26, 1997.
	Nov 26 1997	Brief of respondent Kenneth Apfel, Commissioner of Social Security in opposition filed.
	Dec 11 1997	DISTRIBUTED. January 9, 1998
	Jan 12 1998	REDISTRIBUTED. January 16, 1998
	Jan 16 1998	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 27, 1998. The brief of respondents is to be filed with t he Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 27, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 13, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 22, 1998. **********
	Jan 26 1998	Allen R. Snyder, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
	Feb 19 1998	Joint appendix filed.
	Feb 24 1998	Brief of petitioner Sandra K. Forney filed.
	Feb 27 1998	Brief of respondent Kenneth Apfel, Commissioner of Social Security in support of petition filed.
	Mar 16 1998	CIRCULATED.
	Mar 25 1998	Motion of Solicitor General for divided argument filed.
	Mar 27 1998	Brief amicus curiae of Allen R.Snyder in support of judgement below filed.
	Apr 6 1998	Motion of Solicitor General for divided argument GRANTED. to be divided as follows: petitioner - 15 minutes; the Solicitor General - 15 minutes; amicus curiae in support of judgment below - 30 minutes.
	Apr 9 1998	Record filed.
	Apr 13 1998	Reply brief of respondent in support of reversal filed.
	Apr 13 1998	Reply brief of petitioner Sandra K. Forney filed.
	Apr 22 1998	ARGUED.

97-5737

No._____

Supreme Court, U.S.
FILED
AUG 25 1997
OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA K. FORNEY,

Petitioner,

ORIGINAL

vs.

JOHN J. CALLAHAN, Acting Commissioner,
Social Security Administration,

Respondent.

On Petition For A Writ Of Certiorari

To The United States Court Of Appeals

For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ralph Wilborn, Attorney at Law
Counsel of Record For Petitioner
Ralph Wilborn & Etta L. Wilborn, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
(541) 485-4265

58pp

QUESTION PRESENTED

May a Social Security Disability claimant who in district court procures a final judgment with an accompanying order of remand for additional administrative proceedings, pursuant to sentence four of 42 U.S.C. § 405(g), **appeal to the Circuit Court of Appeals on the ground that broader relief (*e.g.*, an outright award of disability benefits) should have been granted by the district court**, based on issues which the district court decided adversely to the claimant?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii
- Cases iii
- Statutes iii
- Other iii

TABLE OF CONTENTS FOR APPENDIX, INCLUDING CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY COURTS AND THE SOCIAL SECURITY ADMINISTRATION iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 2

GROUNDS FOR JURISDICTION 3

STATUTES AND REGULATIONS INVOLVED IN THIS CASE 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT: ARGUMENT 6

CONCLUSION 12

INDEX OF AUTHORITIES

CASES

Bohms v. Gardner, 381 F.2d 283 (8th Cir. 1967) 9
Forney v. Chater, 108 F.3d 228 (9th Cir. 1997) 2, 5
Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990) 6, 7, 8, 9, 11
Shalala v. Schaefer, 113 S.Ct. 2625 (1993) 6, 9, 11

STATUTES

28 U.S.C. § 1254(1) 3
42 U.S.C. § 405(g) 1-7, 9, 11

OTHER

P.L. 103-296, § 106(d) 1
Supreme Court Rules 13.3, 29.2, and 30.1 3

TABLE OF CONTENTS FOR APPENDIX
INCLUDING CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY COURTS AND THE SOCIAL SECURITY ADMINISTRATION

Opinion, U.S. Court of Appeals for the Ninth Circuit, filed March 4, 1997, officially published as Forney v. Chater, 108 F.3d 228 (9th Cir. 1997) 1-13

Judgment, U.S. District Court for the District of Oregon, filed May 24, 1995 14

Opinion and Order, U.S. District Court for the District of Oregon, entered May 2, 1995 15-25

Decision of Administrative Law Judge Stephen P. Kramer, dated April 18, 1994 . . . 26-38

Action of Appeals Council Upon Request for Review, undated 39-40

Order, U.S. Court of Appeals for the Ninth Circuit, filed May 29, 1997, denying appellant's petition for rehearing 41

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sandra K. Forney (hereinafter "Forney"), respectfully petitions this Court to issue a *writ of certiorari* to review the March 4, 1997, published OPINION of the United States Court of Appeals for the Ninth Circuit (hereinafter, Ninth Circuit), declining to permit Forney immediately to appeal adverse rulings of the district court and dismissing her appeal.

In the U.S. District Court for the District of Oregon, Forney sought judicial review of the final decision of the Commissioner of the Social Security Administration[1] which denied Forney's application for Social Security disability benefits protectively filed on November 18, 1991. The district court held against Forney on three substantive issues. Pursuant to the fourth sentence of 42 U.S.C. § 405(g), the district court then remanded Forney's Social Security disability case to the Social Security Administration for further proceedings with regard to an unrelated fourth issue.

Forney sought immediately to appeal to the Ninth Circuit the district court's three adverse rulings. However, the Ninth Circuit dismissed Forney's appeal, holding that Forney is precluded from appealing the district court's adverse rulings until after the agency completes remand proceedings with regard to the fourth unrelated issue. At that time, the Ninth Circuit held, if Forney has not been granted disability benefits, she may file a new and separate civil action to seek review of the district court's adverse rulings in the instant civil action.

Because Forney believes the Ninth Circuit's decision conflicts with Supreme Court precedent and the express language of 42 U.S.C. § 405(g), she hereby petitions for a *writ of certiorari*.

/ / /

[1] Pursuant to § 106(d) of P.L. 103-296, the Social Security Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in Social Security cases was transferred to the Commissioner of the Social Security Administration, effective March 31, 1995. Although the Secretary of Health and Human Services was responsible for the actions of the Social Security Administration at the time of the final decision in this case, the undersigned refers to "the Commissioner" throughout this petition for the sake of convenience.

OPINIONS BELOW

Petitioner, Sandra K. Forney, filed an application for Social Security disability benefits on November 18, 1991. Forney alleged disability beginning June 7, 1991, and continuing. Following mesne administrative proceedings, by decision dated April 18, 1994, an administrative law judge (ALJ), Stephen P. Kramer found that Forney was not disabled. (Appendix at 26-38). The Appeals Council of the Social Security Administration declined to review the ALJ's decision. (Appendix at 39-40). This action resulted in the ALJ's decision becoming the agency's final decision pursuant to 42 U.S.C. § 405(g).

Forney appealed to the U.S. District Court for the District of Oregon, raising four issues. Following full briefing, U.S. District Judge, Robert E. Jones, by OPINION AND ORDER entered May 2, 1995, and JUDGMENT entered May 25, 1995, held against Forney on her first three issues[2] and held in her favor on the fourth[3]. Because of the district court's favorable ruling on Forney's fourth issue, the district court then reversed the ALJ's decision and remanded the matter, pursuant to sentence four of 42 U.S.C. § 405(g), for additional administrative proceedings.

Forney sought immediately to appeal the district court's three adverse rulings to the Ninth Circuit. Specifically, Forney argued that the district court incorrectly had held against Forney on those three issues, and that if the Ninth Circuit correctly were to resolve those issues, remand *for payment of benefits* (instead of remand for additional proceedings) would be mandated. By published OPINION filed March 4, 1997 (see Forney v. Chater, 108 F.3d 228 (9th Cir. 1997)), the court of appeals declined to permit Forney immediately to appeal the adverse rulings of the district court and dismissed her appeal. (Appendix at 5-13). Specifically, the Ninth Circuit held as follows:

> Forney prevailed in district court by securing a remand to the Secretary pursuant to sentence four of 42 U.S.C. § 405(g). The remand order terminated her civil action

[2] See Appendix at 22-24.

[3] See Appendix at 24-25.

favorably to her, and she is the prevailing party. As a prevailing party, she cannot appeal the remand order. Accordingly, Forney's appeal is DISMISSED.
(See Appendix at 13).

By Order filed May 29, 1997, the U.S. Court of Appeals for the Ninth Circuit denied Forney's petition for rehearing. (Appendix at 41).

GROUNDS FOR JURISDICTION

The published OPINION of the U.S. Court of Appeals for the Ninth Circuit was entered March 4, 1997. (Appendix at 1-13). Forney's petition for rehearing was denied by Order filed May 29, 1997. (Appendix at 41). The instant petition for a *writ of certiorari* is filed within 90 days of the denial of the petition for rehearing and is timely under Supreme Court Rules 13.3, 29.2, and 30.1.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The following statute, 42 U.S.C. § 405(g) is at issue in the instant appeal:

42 U.S.C. § 405(g) Judicial review.

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides.... [...] As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. **The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.** The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be

taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. **The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions**. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.
42 U.S.C. § 405(g) (bold emphases added).

STATEMENT OF THE CASE

Forney seeks review of a judgment of the U.S. Court of Appeals for the Ninth Circuit. The basis for federal jurisdiction in the court of first instance, the U.S. District Court for the District of Oregon, was pursuant to 42 U.S.C. § 405(g), following issuance of a final decision by the Commissioner of the Social Security Administration.

Forney petitions for a *writ of certiorari* to review the OPINION of the Ninth Circuit dismissing Forney's appeal of the district court's adverse rulings.

The following facts are material to consideration of the questions presented:

1) The district court held against Forney on three issues. (See Appendix at 22-24, sections I, II, and III).

2) A holding favorable to Forney on any one of the three adverse rulings would have resulted in a remand for payment of benefits, without additional administrative proceedings. **Remand for payment of benefits constitutes <u>all the relief Forney sought</u>.**

3) The district court held in Forney's favor on an unrelated fourth issue, and remanded the case for further proceedings, pursuant to the fourth sentence of 42 U.S.C. § 405(g). (See Appendix at 24-25, section IV). **Remand for additional proceedings is <u>less than all the</u>**

relief Forney sought,[4] and it is not reasonably foreseeable that remand for additional proceedings will lead to Forney's obtaining all the relief sought.

4) The fourth sentence of 42 U.S.C. § 405(g) provides as follows:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

5) Describing the appealability of a final judgment entered pursuant to the fourth sentence of 42 U.S.C. § 405(g), the eighth sentence of 42 U.S.C. § 405(g) provides as follows:

> The judgment of the court shall be final except that it shall be subject to review **in the same manner as a judgment in other civil actions**. (Emphasis added).

6) "[I]n other civil actions," plaintiffs who obtain less than all the relief sought normally have the right to appeal "adversely decided" issues to the appellate court in an attempt to obtain all the relief sought.

7) Because Forney did not prevail on the district court's three adverse rulings, and because **she did not obtain all the relief sought**, Forney sought review by the Ninth Circuit of the district court's three adverse rulings.

8) In a decision which has been published in the Federal Reporter as Forney v. Chater, 108 F.3d 228 (9th Cir. 1997), the Ninth Circuit held that Forney prevailed in district court by securing a remand pursuant to sentence four of 42 U.S.C. § 405(g). Because the remand order terminated her civil action favorably to her, she is the prevailing party. As a prevailing party, she cannot immediately appeal the district court's adverse rulings and order of remand.

9) With regard to the district court's three adverse rulings, Forney is not a prevailing party.

10) Forney asserts that she has the right immediately to appeal the district court's three

[4] As will be discussed below, because the remand order directs the agency to apply an improper legal standard upon remand, remand for additional proceedings is, essentially, no relief at all. Instead, in all probability, it merely imposes an additional two-year delay before Forney is permitted meaningful judicial review.

adverse rulings, and that she has a right to seek, on appeal, all the relief sought before the district court.

REASONS FOR GRANTING THE WRIT: ARGUMENT

Petitioner Forney respectfully submits this case presents an important federal question for which there are compelling reasons the petition for a *writ of certiorari* should be granted. Because the Social Security Act is a federal program, national in scope and remedial in purpose, there is a compelling need for meaningful appellate review of the agency's findings.

First, this case involves a split in the circuits courts of appeal over an important question of federal law. This Court should resolve this circuit split.

Second, this case involves an important question of federal law which, according to the Ninth Circuit, has not been settled by the Supreme Court. This Court should settle this important federal question.

Finally, in its published OPINION, the Ninth Circuit has decided an important federal question in a way which conflicts with this Court's holdings in Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990) and Shalala v. Schaefer, 113 S.Ct. 2625 (1993).

This Court should grant the petition for a *writ of certiorari* in order to resolve the issue of whether or not a Social Security disability claimant has the right, upon procuring a final judgment with an order of remand for additional proceedings, pursuant to sentence four of 42 U.S.C. § 405(g), immediately to appeal the district court's adverse rulings on issues unrelated to the issue which formed the basis for the remand order, and to seek on appeal all the relief sought before the district court.

It is not contested that, in many circumstances, federal court orders remanding cases to administrative agencies for further proceedings are interlocutory orders which are not immediately appealable. Indeed, such may be the general rule. However, Forney contends that the instant case is distinguishable from such a general rule, because Congress and the Supreme Court expressly have defined Social Security disability claimants as a class of plaintiffs that may appeal

from final judgments entered pursuant to sentence four of 42 U.S.C. § 405(g), *even though* those final judgments may be accompanied by remand orders.

The fourth sentence of 42 U.S.C. § 405(g) provides as follows:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

42 U.S.C. § 405(g), sentence four.

It is uncontested that the district court remanded the instant case pursuant to the foregoing fourth sentence of 42 U.S.C. § 405(g). Specifically, the district court affirmed the agency's findings on three issues, then "remand[ed] the cause for a rehearing" based on a fourth, unrelated, issue.

The eighth sentence of 42 U.S.C. § 405(g) provides as follows:

> The judgment of the court shall be final **except that it shall be subject to review in the same manner as a judgment in other civil actions**.

42 U.S.C. § 405(g), sentence eight (all emphases added).

At slip op. 2244 (reproduced at Appendix page 10), the Ninth Circuit correctly held that the sentence four remand judgment herein is "final"[5] with respect to "all parties...." (Appendix at 10). However, the Ninth Circuit then held that Forney nevertheless does not have the right immediately to appeal the adverse findings contained in that final judgment and to seek on appeal the relief denied by the district court. (See Appendix at 11 and 13). Instead, the Ninth Circuit held that Forney must acquiesce in the order of remand and endure the remand proceedings. If, following the administrative proceedings upon remand, Forney has not been found disabled, and she still desires to pursue her disability claim, she must file a new and separate civil action in district court before being able to appeal the district court's adverse rulings in the instant case.

Forney contends that the Ninth Circuit's holding conflicts with the plain language of 42 U.S.C. § 405(g), sentence eight, quoted above, and that the court's holding conflicts with Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990), where the Supreme Court held that a remand judgment

[5] That is, the judgment is not merely interlocutory, and it "terminates the civil action." (Appendix at 9-10, citing Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990); emphasis added by Forney).

entered pursuant to the fourth sentence of 42 U.S.C. § 405(g) is "a final, appealable judgment *even though* that judgment may be accompanied by a remand order." Finkelstein at 2666 (emphases added).

In Finkelstein, the Supreme Court addressed this issue and reached a different conclusion than did the Ninth Circuit in the instant case. In Finkelstein, this Court held as follows:

> Respondent also argues that the eighth sentence of § 405(g), providing that the judgment of the district court "shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions," does not compel the conclusion that a judgment entered pursuant to the fourth sentence is immediately appealable. In respondent's view, Congress used the the term "final" in the eighth sentence only to make clear that a court's decision reviewing agency action could operate as law of the case and res judicata. Cf. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 78 S.Ct. 1209, 1218, 2 L.Ed.2d 1345 (1958). But even if it is true that Congress used the term "final" to mean "conclusively decided," this reading does not preclude the construction of "final" to include "appealable," a meaning with which "final" is usually coupled. Nor does respondent consider the significance of Congress' use of the term "judgment" to describe the action taken by the District Court in this case. [Footnote omitted]. Although respondent argues that the words "final decisions," as used in 28 U.S.C. § 1291, encompass no more than what was meant by the terms "final judgments and decrees" in the predecessor statute to § 1291, respondent recognizes that "final judgments" are at the core of matters appealable under § 1291, and **respondent does not contest the power of Congress to define a class of orders as "final judgments" that by inference would be appealable under § 1291**. Cf. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434, 76 S.Ct. 895, 899, 100 L.Ed. 1297 (1956). **This is what Congress has done in the fourth sentence of § 405(g)**. [Footnote omitted].
>
> More generally, respondent argues that a power in the district court to remand to an agency is always incident to the power to review agency action and that § 405(g) only expanded the district courts' equitable powers; therefore, she insists, it is improper to construe § 405(g) as a limit on the district courts' power to remand. This argument misapprehends what Congress sought to accomplish in § 405(g). The fourth sentence of § 405(g) does not "limit" the district courts' authority to remand. Rather, **the fourth sentence directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order**. The fourth sentence does not require the district court to choose between entering a final judgment and remanding; to the contrary, it specifically provides that a district court may enter judgment "with or without remanding the cause for a rehearing."

Finkelstein 110 S.Ct. at 2665-66 (bold and underlined emphases added).

It is beyond question that Forney could have appealed the district court's adverse findings had the district court not "accompanied [its judgment with] ...a remand order." In accordance with Finkelstein, Forney maintains that the Ninth Circuit court's OPINION is in error, and that the district court's judgment in this case is appealable "*even though* that judgment [was] accompanied by a remand order." Finkelstein 110 S.Ct. at 2666 (emphases added).

Indeed, in footnote 3 of Finkelstein, this Court expressly notes, "In other cases **the district court may order a remand to the agency but the person seeking judicial review may seek to appeal on the ground that broader relief should have been granted by the district court**."[6] Finkelstein 110 S.Ct. at 2663, footnote 3 (bold emphasis added). Forney contends that this Court's ultimate holding in Finkelstein, and the plain language of 42 U.S.C. § 405(g), both mandate the conclusion that plaintiffs in Forney's position "may seek to appeal on the ground that broader relief should have been granted by the district court."

Forney also contends that the Ninth Circuit's OPINION conflicts with Shalala v. Schaefer, 113 S.Ct. 2625 (1993), where the Supreme Court, quoting from sentence eight of § 405(g), clarified that the judgment authorized by sentence four of 42 U.S.C. § 405(g) "shall be final except that **it shall be subject to review in the same manner as a judgment in other civil actions**." Schaefer 113 S.Ct. at 2629 (all emphases added). Contrary to this Court's holding in Schaefer, in the instant case, the Ninth Circuit held that Forney's sentence four judgment is not "subject to review in the same manner as a judgment in other civil actions." Instead, the Ninth Circuit held that Forney's final judgment is appealable only in the same manner as interlocutory orders normally are appealable in other civil actions (*i.e.*, they aren't). This holding conflicts with Supreme Court precedent, and it contravenes the plain language of 42 U.S.C. § 405(g).

In holding that Forney's sentence four judgment is not immediately appealable, the Ninth Circuit failed adequately to distinguish between remand judgments which terminate the civil action and remand orders which are merely interlocutory. The court's holding conceivably could lead to an endless circle of civil actions and district court remands, wherein Forney would never be afforded appellate review.

---

[6] For this proposition, the Court cited Bohms v. Gardner, 381 F.2d 283 (CA8 1967), *cert. denied*, 390 U.S. 964, 88 S.Ct. 1069, 19 L.Ed.2d 1164 (1968), then stated, "None of these situations are presented in this case, and we express no opinion about appealability in those circumstances." Id. Bohms involved a **sentence six** remand, and the conclusion reached by the Bohms court (appeal dismissed because a **sentence six** remand is not a final judgment) is fully consistent with Finkelstein, which holds that a **sentence four** remand is a final judgment, and with Schaefer, 113 S.Ct. at 2631, which holds that a **sentence six** remand is not a final judgment.

Forney applied for benefits 5½ years ago. Her claim was denied and she requested reconsideration. Her claim was denied again, and she requested a hearing. After a hearing, her claim was denied a third time, and she requested review by the Appeals Council. The Appeals Council remanded the case for another hearing, after which Forney's case was denied yet a fourth time. She again requested Appeals Council review, and the Appeals Council denied her claim for a fifth time. Forney appealed to federal court. Three and one half years after Forney applied for disability benefits, the district court remanded Forney's case for yet a third hearing, and directed the agency to apply an improper standard which seriously prejudices Forney's case.

Since June 7, 1991, over six years ago, Forney has been unable to work and unable to support herself. The Ninth Circuit court's OPINION holds that after being denied benefits by the agency five times after two hearings, one intra-agency remand, and one federal court remand, over the course of three and one half years, Forney does not have the right to appellate review of those issues which, if correctly decided by the appellate court, would warrant remand for an immediate award of disability benefits.

Upon remand, the agency will adjudicate Forney's case by applying the incorrect standards dictated by the district court's remand order. Based on the undersigned's experience, it will take approximately two years for Forney's case to work its way down through the agency's Appeals Council, back to another hearing and denial, back up to the Appeals Council, and back to federal court. Approximately two years' time will be expended on the application of the improper legal standard dictated by the district court's remand order, and it is not reasonably foreseeable that Forney will be any better off after the remand proceedings are completed. At the end of the unproductive remand proceedings, it will have been approximately 8 years since Forney applied for benefits, and if the district court again remands her case to the agency, she again will be without the right to appellate review. This cycle conceivably could continue *ad infinitum*, with Forney never being afforded the right to meaningful appellate review. **This** is not, in the words of the Ninth Circuit, "judicial economy." See slip op. at 2245. (Appendix at 11).

/ / /

The Ninth Circuit's rationale regarding judicial economy (see Appendix at 11) does not apply herein. The instant case does not represent a "piecemeal" appeal, which "normally will leave further administrative proceedings to follow regardless of the outcome of the appeal." Slip op. 2245, fn 6. (Appendix at 11). Instead, if the appellate court addresses Forney's arguments on the merits, and if the appellate court holds in Forney's favor on the matters she seeks to appeal, the court will order an award of benefits, and the matter will be at an end. Nor is Forney at all likely "on remand, [to] secure all the relief she seeks," as the Ninth Circuit speculates at slip op. 2245. (Appendix at 11). Instead, given the district court's adverse and incorrect findings, and given that the agency will apply incorrect legal standards during the remand proceedings, it is virtually certain that Forney will be back before the district court pursuing her claim in yet another civil action several years from now.

THE CIRCUITS ARE SPLIT

The Seventh, Ninth, and Tenth Circuits have published opinions permitting immediate appeals, by prevailing plaintiffs, of judgments of remand pursuant to 42 U.S.C. § 405(g), sentence four. See Richmond v. Chater, 94 F.3d 263 (7th Cir. 1996), Atkins v. Shalala, 837 F.Supp. 318 (D.Or. 1993), *as modified by* Atkins v. Shalala, 70 F.3d 529 (9th Cir. 1995), and Nguyen v. Shalala, 43 F.3d 1400 (10th Cir. 1994). Ironically, because of the conflict between the published decision in Atkins and the published decision in Forney, the Ninth Circuit also has an intra-circuit conflict.

Richmond, Atkins, and Nguyen are consistent with this Court's holdings in Finkelstein and Schaefer that remand orders pursuant to sentence four of § 405(g) are **appealable**, *even though* accompanied by a remand order. This Court should grant the petition for a *writ of certiorari* and so find. Because the Ninth Circuit's decision creates an inter-circuit conflict and because it conflicts with both this Court's precedential holdings and the Social Security Act, this Court should issue a *writ of certiorari* to review the decision of the U.S. Court of Appeals for the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Forney respectfully prays that this Court issue a *writ of certiorari* to review the OPINION of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Ralph Wilborn, Attorney at Law
Counsel Of Record For Petitioner
Ralph Wilborn and Etta L. Wilborn, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401 (541) 485-4265

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANDRA K. FORNEY,
Plaintiff-Appellant,
v.
SHIRLEY S. CHATER, Secretary, Commissioner, Social Security Administration,
Defendant-Appellee.

No. 95-35560
D.C. No.
CV-94-06357-REJ
OPINION

Appeal from the United States District Court
For the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
November 8, 1996—Portland, Oregon

Filed March 4, 1997

Before: William C. Canby, Jr., Pamela Ann Rymer, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Government Law/Social Security

The court of appeals affirmed a judgment of the district court. The court held that a social security disability claimant prevailing in the district court to the extent of winning a remand pursuant to sentence four of 42 U.S.C. § 405(g) is not entitled to appeal.

Appellee Social Security Administration (Secretary) denied appellant Sandra Forney disability benefits. An administrative law judge (ALJ) upheld the denial. Forney sought review in district court. As to three of her contentions, the court ruled against Forney, holding that the ALJ did not err in rejecting her physician's testimony; in discrediting her pain testimony; or in ruling that a hypothetical question to the vocational expert included all of her relevant physical limitations. As to her fourth contention, the court ruled in her favor, holding that the vocational expert incorrectly selected as employment available to Forney several occupations that required reaching. The court remanded for further inquiry into whether there were any occupations that Forney, with her impaired reaching ability, could engage in.

Forney appealed the first three rulings.

[1] The threshold question was whether Forney could appeal when the district court ordered a remand under sentence four that might result in an award of all benefits she claimed.

[2] A few years ago, the district court's decision would not have been said to be "final." [3] In a 1990 case, the Supreme Court permitted the Secretary to appeal as final a decision remanding a social security disability claim for further administrative proceeding. As in prior Ninth Circuit decisions, the Supreme Court pointed out that should the Secretary on remand undertake the inquiry mandated by the district court and award benefits, it would be doubtful whether he could appeal his own order.

[4] The fourth sentence of § 405(g) authorizes the district court "to enter 'a judgment' affirming, modifying, or reversing the decision of the Secretary *with or without remanding the cause for a rehearing.*" The Supreme Court held that the district court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the

Secretary's final determination that the claimant was not entitled to benefits. In light of that comment, it could not be concluded that the decision in this case was not final for Forney as well as for the Commissioner.

[5] A civil action ending in a sentence-four remand is "final" for all parties to it. [6] That fact, however, did not necessarily entitle Forney to appeal the district court's decision. A prevailing party normally may not appeal the decision in its favor. A claimant "prevails" when he or she succeeds in securing a sentence-four remand that may result in an award of all the benefits claimed. [7] On remand, Forney might secure all the relief she sought. If she were to, a decision on the merits of the appeal would have been wholly unnecessary.

[8] If Forney were to be denied benefits on remand, she would have to seek review by commencing a new civil action. [9] The crucial question for Forney would arise on appeal of an adverse decision of the district court in her new civil action. Would she be foreclosed by principles of res judicata of collateral estoppel from litigating the issues decided against her in her first, final civil action, in which she "prevailed?" [10] The answer is, "no." It would be inappropriate to hold Forney to rulings that she had been precluded from appealing. [11] Further, collateral estoppel applies only to rulings that were essential to the judgment in the prior case and the district court's rulings against Forney were all unnecessary to the remand.

COUNSEL

Ralph Wilborn, Ralph Wilborn and Etta L. Wilborn, Eugene, Oregon, for the plaintiff-appellant.

Kathryn A. Warma, Assistant Regional Counsel, Social Security Administration, Seattle, Washington, for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

Sandra K. Forney appeals the district court's order that remanded to the Administrative Law Judge ("ALJ") Forney's application for disability benefits under the Social Security Act. A threshold issue is whether Forney, who has prevailed in district court to the extent of winning a remand pursuant to sentence four of 42 U.S.C. § 405(g), may now appeal the district court's ruling to this court. We conclude that she may not, and accordingly dismiss the appeal.

I. Facts

Forney applied for disability benefits in 1991. Her application was denied and she requested a hearing. An administrative law judge (ALJ) held a hearing and denied benefits. The ALJ's decision was reviewed by the Appeals Council, which remanded the matter to the ALJ for a further hearing. The ALJ again denied the claim, and this time the Appeals Council denied review.

Forney then sought review in district court, pursuant to 42 U.S.C. § 405(g). The district court ruled on four of Forney's contentions. First, it held that the ALJ did not err in rejecting the testimony of Forney's treating physician, because it conflicted with Forney's own testimony. Second, the district court upheld the ALJ's discrediting of Forney's testimony regarding the severity of her pain; the district court stated that the ALJ made specific findings regarding Forney's courtroom appearance and testimony that were sufficient to support the finding. Third, the court held that the hypothetical questions posed to the vocational expert included all of Forney's relevant physical limitations, in light of the permissible disregard of the testimony of her treating physician. Fourth and last, the district court ruled that the vocational expert incorrectly selected as employment available to Forney several occupa-

tions that required frequent or constant reaching, when the credited expert testimony was that Forney's capacity to reach was impaired. In consequence of this last ruling, the district court held that the Secretary had failed to sustain her burden of showing that Forney, who could no longer perform her previous work, can engage in substantial work in the economy. The district court then remanded the matter to the Secretary for further proceedings, which will presumably include further inquiry into whether there are any occupations that Forney, with her impaired reaching ability, can engage in.

II. Appealability

[1] Forney now appeals, seeking to challenge the district court's first three rulings. The threshold issue is whether Forney may appeal at this time when the district court has ordered a remand under sentence four of § 405(g) that may result in an award of all benefits she claimed. We conclude that she may not.

[2] A few years ago, before the Supreme Court's most recent pronouncements dealing with such remands, we would have said that the district court's decision was not "final," within the meaning of 28 U.S.C. § 1291, insofar as Forney is concerned. We so held in a similar situation in *Gilchrist v. Schweiker*, 645 F.2d 818, 819 (9th Cir. 1981). In *Gilchrist*, an ALJ had rejected a claim of disability from back pain, in part because the allegations of pain were inconsistent with the ALJ's personal observation of the claimant. The district court remanded the matter to the Secretary for reconsideration in light of the extensive medical history of Gilchrist's efforts to secure relief from pain. We held that this remand "does no more than order clarification of the administrative decision," and provided nothing final for us to review. *Id.* at 819.

Gilchrist was distinguishable from another line of our cases, in which we permitted the *Secretary* to appeal from an order of the district court deciding a separable legal issue and

remanding the matter to the administrative agency for further proceedings. The leading example is *Stone v. Heckler*, 722 F.2d 464, 466-68 (9th Cir. 1983). In *Stone*, an ALJ had applied the Secretary's medical-vocational guidelines to find no disability. On review, the district court held that the ALJ could not rely on those guidelines, but would have to make specific factual findings on jobs that the claimant could perform. *Stone*, 722 F.2d at 467. The Secretary appealed, arguing that the district court had applied an improper legal standard that would govern further proceedings and should be subject to immediate appellate review. We held that the district court's decision was "final" and appealable by the Secretary, stating:

> The district court's decision is adverse to the Secretary and, if wrong, would result in a totally wasted proceeding below, from which the Secretary may not be able to appeal. Deciding this legal issue now will promote the least possible waste of judicial resources.

Id. We recognized that numerous other courts, in deciding whether remand orders were appealable, had "especially considered whether a holding of nonappealability would effectively deprive the litigants of an opportunity to obtain review." *Id.*

We have followed *Stone* in other cases where the Secretary or similar administrative official sought to appeal orders remanding for administrative proceedings that would be governed by a separable, arguably incorrect, legal standard incorporated in the remand decision. *See Regents of the Univ. of Calif. v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985) (amended opinion) (Secretary of Health and Human Services may appeal adverse decision remanding for further administrative proceedings; *Kaho v. Ilchert*, 765 F.2d 877, 880-81 (9th Cir. 1985) (District Director of INS may appeal remand order). The key to all of these decisions is that, if no appeal

of the remand order were permitted, the Secretary might later be precluded from any appeal. The principle was best explained in *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990). In *Chugach*, we permitted the Secretary of the Interior to appeal a district court decision interpreting the Alaska Native Claims Settlement Act and remanding an affected Native group's boundary dispute to the Interior Board of Land Appeals. In explaining why we would review the statutory interpretation prior to the remand, we said:

> [F]ailing to permit immediate appeal might foreclose review altogether: Should the Secretary lose on remand, there would be no appeal, for the Secretary cannot appeal his own agency's determinations.

Id.; *see also United States v. Louisiana-Pacific Corp.*, 846 F.2d 43, 45 (9th Cir. 1988) (declining to permit United States to appeal remand order when it would have means of securing later review; distinguishing *Stone* where, after remand, "the Secretary would have no right to appeal").

These considerations do not apply, of course, to Forney. If she is denied benefits on remand, nothing prevents her from seeking review of the denial. Moreover, she may prevail in the administrative proceedings on remand and obtain complete relief. Accordingly, we would have been inclined, under our prior analysis, to hold that the district court's remand decision was not "final" as to Forney.

[3] In recent years, however, the Supreme Court has spoken in terms that necessarily modify our former approach to "finality" of remand decisions. In *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), the Court permitted the Secretary to appeal as final a decision remanding a Social Security disability claim for further administrative proceedings. As in our cases just discussed, the Court pointed out that, "should the Secretary on remand undertake the inquiry mandated by the District Court and award benefits, there would be grave doubt, as the

Court of Appeals recognized, whether he could appeal his own order." *Id.* at 625.

[4] In discussing the question of finality of district court decisions under § 405(g), however, the Court made clear that decisions by a district court remanding under the fourth sentence of § 405(g) ended the civil action brought to review the Secretary's initial decision.[1] "The use of the term 'a civil action' suggests that at least in the context of § 405(g), each final decision of the Secretary will be reviewable by a separate piece of litigation." *Id.* at 624-25. The fourth sentence of § 405(g) authorizes the district court "to enter 'a *judgment* affirming, modifying, or reversing the decision of the Secretary, *with or without remanding the cause for a rehearing*.' " *Id.* at 625 (quoting 405(g) (emphasis by the Supreme Court)). Thus, according to the Supreme Court:

> The District Court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue.

Id. In light of this comment that the remand order terminates the civil action, we cannot very well conclude that the deci-

[1]Remands are also authorized by the sixth sentence of § 405(g), and those remands do not necessarily terminate the civil action. The sixth sentence authorizes remands only when the Commissioner so moves before filing an answer, or when there is a showing of new material evidence and good cause for not earlier placing it in the record. Neither of these conditions is met in the present case. Forney's remand order therefore falls under the fourth sentence of 405(g). *See Finkelstein*, 496 U.S. at 626; *Shalala v. Schaefer*, 113 S. Ct. 2625, 2629 & n.2 (1993).

sion in our case is not final for Forney as well as for the Commissioner.[2]

The fact remains, however, that Forney possibly may obtain all of the relief she seeks in the administrative proceedings on remand. The considerations of judicial economy that, before *Finkelstein*, led us to hold remands generally non-final are still present. There is a temptation, accordingly, to resist the conclusion that *Finkelstein* makes a sentence-four remand final for the claimant as well as the Secretary. After all, the Court in *Finkelstein* stated that it was not making a rule for all remands: "There is, of course, a great variety of remands, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges." *Id.* at 623 (footnote omitted). The Court was only ruling on "whether orders of the type entered by the district court are immediately appealable *by the Secretary*." *Id.* And all but one[3] of the published decisions of the courts of appeals applying *Finkelstein* involve instances in which the Secretary or comparable agency official is allowed to appeal because, if the remand results in victory for the claimant, the Secretary will be unable to appeal. *See, e.g., St. Francis Medical Ctr. v. Sullivan*, 962 F.2d 1110, 1114 (3d Cir. 1992); *Colvin v. Sullivan*, 939 F.2d 153, 155 (4th Cir. 1991); *Travis v. Sullivan*, 985 F.2d 919, 922-23 (7th Cir. 1993); *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1009 (10th Cir. 1996).

[5] In the end, however, it is apparent that to conclude that a sentence-four remand is not final for the claimant is analytically untidy; it is flatly inconsistent with the Supreme Court's insistence in *Finkelstein* that a sentence-four remand termi-

[2]It makes no difference that the district court, in remanding, purported not to enter a judgment. The sentence-four remand order *is* a final judgment, whether or not denominated as such. *Shalala*, 113 S. Ct. at 2632 & n.6.

[3]For the one exception, see note 6, *infra*.

nates the civil action. Indeed, it is error for the district court to attempt to retain jurisdiction upon making a sentence-four remand. *See Shalala*, 113 S. Ct. at 2630. Thus the Fifth Circuit has interpreted *Finkelstein* to preclude a claimant who has been denied benefits administratively after a sentence-four remand from reinstating her district court action to secure further review. *Frizzell v. Sullivan*, 937 F.2d 254, 256-57 (5th Cir. 1991). In order to contest the post-remand denial of benefits, the claimant must institute a new action. *See id.* at 255. The civil action ending in a sentence-four remand, therefore, must be "final," in a formalistic sense, for all parties to it.[4]

[6] That fact, however, does not necessarily entitle Forney to appeal the district court's decision. A prevailing party normally may not appeal the decision in its favor. *See Electrical Fittings Corp. v. Thomas & Betts Corp.*, 307 U.S. 241, 242 (1939) ("A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining review of findings he deems erroneous which are not necessary to support the decree"); *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994) (following *Electrical Fittings*). There can be little doubt that a claimant "prevails" in the view of the Supreme Court when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed.[5] The Court so held for purposes of attorney's fee awards in *Shalala*, 113 S. Ct. at 2631.

[4]Although the language of § 405(g) and *Finkelstein*, 496 U.S. at 624-25, clearly support the notion that a claimant who has secured a sentence-four remand and then been denied benefits must bring a new action to contest the denial, the advantages of such a system do not spring readily to mind.

[5]As the Supreme Court recognized in *Finkelstein*, there may be instances when a claimant is foreclosed by the district court's remand decision from part of the benefits sought, and would then seek an appeal from the remand decision on the ground that broader relief should have been awarded. *See Finkelstein*, 496 U.S. at 623 n.3. Like the Supreme Court, we express no opinion on the right of the claimant to immediate appeal in that situation. *See id.* Implicit in this disclaimer, however, is the proposition that when the remand order does *not* foreclose the possibility of the claimant's obtaining all of the relief sought, it is not appealable by the prevailing claimant.

[7] It is true that the status of prevailing party for purposes of attorney's fees under 28 U.S.C. § 2412(d)(1)(B) does not automatically equate with status as prevailing party for purposes of appeal. There are compelling reasons, however, for declining to permit a claimant in Forney's position from appealing the remand order she succeeded in obtaining. They are the same reasons that underlay the long-established general rule that a remand to an administrative agency was not appealable, with an exception only for the Secretary who might be precluded from post-remand access to the court. *See, e.g., Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247 (Fed. Cir. 1992). Forney may, on remand, secure all of the relief she seeks. If she does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record. *See Travelstead*, 978 F.2d at 1247. All of these considerations lead us to conclude that we ought not to entertain Forney's present appeal.[6]

[8] Forney argues, however, that our analysis leaves her in considerable danger. She is the prevailing party in her civil

[6]We do not follow, therefore, the example of the Tenth Circuit in *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994). There the court of appeals permitted a claimant to appeal a sentence-four remand order, stating in a footnote that such remand orders were "final and appealable" under *Finkelstein*. *Id.* at 1402 n.2. We have found no other published decision permitting appeal of such a remand order by a claimant. The outcome of the claimant's appeal was most unusual; the remand order, which had been invited by the Secretary, was held to be improper and the Secretary's denial of benefits was ordered reinstated. *Id.* at 1403-04. Thus the only party that appealed, the claimant, was left worse off for having appealed. We conclude that this scenario is unlikely to be repeated, and that appeal of a remand order by a claimant normally will leave further administrative proceedings to follow regardless of the outcome of the appeal. For that reason, judicial economy militates against permitting the prevailing claimant to appeal.

action that resulted in a remand. Yet on some of the issues she urged, the district court ruled against her. If she is denied benefits on remand, she must seek review by commencing a new civil action. *See Finkelstein*, 496 U.S. at 625 ("each final decision of the Secretary will be reviewable by a separate piece of litigation"); *Frizzell*, 937 F.2d at 255. In that new action, she contends, she is likely to be foreclosed by principles of res judicata, collateral estoppel, or even *stare decisis* from contesting the court's adverse rulings in the prior action. Thus, she contends, she must be allowed to appeal those issues now or forever lose her right to contest them.

[9] Although Forney's argument has some initial appeal, her dilemma is a false one. It is not surprising or unfair that, should Forney return to district court after being denied benefits on remand, the district court likely will adhere to its prior rulings. Even if the district court's remand had not been final, as *Finkelstein* requires it to be, the district court presumably would adhere to the law of the case and not reexamine its earlier rulings. The crucial question for Forney arises when she appeals to this court the adverse decision of the district court in her new civil action. Will she be foreclosed by principles of res judicata or collateral estoppel from litigating the issues decided against her in her first, final civil action, in which she "prevailed"?

[10] The answer is "no." In the first place, it is inappropriate to hold Forney to rulings that she was precluded from appealing. In *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983), we upheld a district court's refusal to hold the government collaterally estopped by an interlocutory ruling that it could not have appealed. *See also United States v. Weems*, 49 F.3d 528, 533 (9th Cir. 1995) (principle that government should not be bound by ruling it could not appeal inapplicable when opposing party appealed and government was able to litigate issue on cross-appeal).

[11] Second, collateral estoppel applies only to rulings that were essential to the judgment in the prior case. *Id.* at 532.

The judgment that Forney has just secured is a sentence-four remand to the Secretary. The district court's rulings against Forney on the issues of rejection of physician's testimony, discrediting of Forney's pain testimony, and inclusion of Forney's physical limitations in the expert's hypothetical questions, were all unnecessary to the remand. The remand was based solely on the error of the vocational expert in testifying that Forney could perform occupations requiring frequent or constant reaching. Thus Forney's case falls squarely within the *Restatement* example that we quoted approvingly in *Weems*, 49 F.3d at 533:

> A, as owner of a trademark, brings an action against B for infringement. B denies the validity of the trademark and denies infringement. The court finds that the trademark is valid, but that B had not infringed it, and gives judgment for B. Thereafter A brings an action against B alleging that since the rendition of judgment B infringed the trademark. B is not precluded from defending this action on the ground that the trademark is invalid.

Restatement Second of Judgments, § 27, comment h, Illustration 14, "Determinations Not Essential to Judgment" (1982). Thus Forney will not be bound in a future appeal by the adverse rulings that we do not permit her to appeal today.

III. Conclusion

Forney prevailed in district court by securing a remand to the Secretary pursuant to sentence four of 42 U.S.C. § 405(g). The remand order terminated her civil action favorably to her, and she is the prevailing party. As a prevailing party, she cannot appeal the remand order. Accordingly, Forney's appeal is

DISMISSED.

Entered on the Docket on 5-25-95
DONALD M. CINNAMOND
By [signature] Deputy

FILED
1995 MAY 24 P 4:12
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
BY [signature]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff(s), v. SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant(s).	)	CIVIL NO. 94-6357 JO
	)	JUDGMENT

Based on the record,

IT IS ORDERED AND ADJUDGED that this case be remanded to the Secretary for further proceedings.

DATED: May 24, 1995

ROBERT E. JONES,
U.S. DISTRICT JUDGE

JUDGMENT

FILED

95 MAY -1 AM 11:51

U.S. DISTRICT COURT

Entered on the Docket on
5/2/95
DONALD M. CINNAMOND
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff,	)	Civil No. 94-6357-JO
v.	)	OPINION AND ORDER
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	)	

Ralph Wilborn
1580 Valley River Drive, Suite 170
Eugene, OR 97401

Attorney for Plaintiff

Kristine Olson
United States Attorney
District of Oregon
Craig J. Casey
Assistant United States Attorney
UNITED STATES ATTORNEY'S OFFICE
888 S.W. Fifth Avenue, Suite 1000
Portland, OR 97204-2024

Richard Wetmore
DEPARTMENT OF HEALTH & HUMAN SERVICES
Region X
2201 Sixth Avenue, M/S Rx-10
Seattle, WA 98121

Attorneys for Defendant

JONES, Judge:

Claimant Sandra Forney seeks judicial review of a final decision of the Secretary of Health and Human Services denying her application for supplemental security income benefits ("SSI") under the Social Security Act.

This Court has jurisdiction to review the Secretary's decision pursuant to 42 U.S.C. § 405(g). Following a careful review of the record, this court concludes that the Secretary's decision is not supported by substantial evidence and must be remanded.

ADMINISTRATIVE HISTORY

Claimant applied for SSI on November 18, 1991, and was initially denied benefits on February 10, 1992. The denial was affirmed on reconsideration. On March 15, 1993, a hearing was held before an Administrative Law Judge ("ALJ"). The ALJ found that claimant was not disabled, and denied her benefits. The Appeals Council granted claimant's request for review and remanded the claim to the ALJ on July 30, 1993.

After the second hearing on April 18, 1994, the ALJ again denied claimant's application for SSI. After the Appeals Council denied review, the ALJ's denial of benefits became the final decision of the Secretary.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence on the record as a whole. "Substantial

evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Tylitzki v. Shalala, 999 F.2d 1411, 1413 (9th Cir. 1993). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusion." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986). The Secretary's decision must be upheld if it is a rational interpretation of the evidence, even if there are other possible rational interpretations. Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989).

SUMMARY OF FACTS

At the time of the first hearing, claimant was 46 years old. Claimant attended high school through the tenth grade and later attained her GED in 1977. Her past work history includes positions as a cook, baker, and kitchen manager for a school.

Dr. Cross, claimant's treating physician, first diagnosed the possibility of fibromyalgia on August 11, 1988. Claimant showed signs of improvement and control over the fibromyalgia from the first diagnosis until July 26, 1991. Thereafter, her condition degenerated and Dr. Cross advised her to stop working because of the pain generated by the fibromyalgia.

Upon the advice of her treating physician, claimant quit her job. Claimant alleges that she is disabled due to the fibromyalgia, also known as fibrositis, and low grade depression stemming from her condition.

On November 18, 1991, claimant applied for SSI benefits. Claimant was examined by Dr. William Dudley as part of the

disability determination process. Dr. Dudley concluded that claimant's condition did not preclude all work. Based on Dr. Dudley's findings, the Secretary denied benefits.

On reconsideration, the Secretary again denied claimant's request for disability benefits, based on reports by Dr. Cross and by a clinical psychologist, Dr. Greenough, Ph.D. In his report, Dr. Cross advised that claimant is restricted to a maximum of 15 minutes of standing and 20 minutes of walking. He also limited claimant from lifting more than 15 pounds, or carrying that weight for more than 30 feet. Dr. Cross further concluded that claimant could work for only two hours during an eight hour day. Dr. Greenough diagnosed claimant with adjustment disorder with depression and characteristics of a dependent personality disorder.

At the hearing on January 13, 1993, a psychologist, Dr. Isabelle Moser, Ph.D., and a vocational expert testified as impartial experts. Both concluded from the evidence presented at the hearing that claimant is capable of working with moderate limitations. The vocational expert further testified that claimant cannot return to her past relevant work.

Claimant testified that she lives with her husband in an apartment. She exercises by walking two miles a day and by participating in water aerobics. For social activities, claimant visits with her family. Although claimant is able to do light housekeeping and grocery shopping, her husband performs the heavy work such as major grocery shopping and carrying laundry.

The ALJ concluded that claimant is not disabled and has the residual functional capacity to perform work that does not involve lifting more than 15 to 20 pounds or walking more than two miles, and that allows her to stand and change position at will. The ALJ doubted claimant's credibility as to the degree of pain she currently suffers.

After claimant appealed the ALJ's decision, the Appeals Council remanded the case for another hearing based upon its conclusion that the evidence did not support the ALJ's assessment of the claimant's residual functional capacity. On remand, the ALJ was instructed to obtain a consultative general medical examination.

The hearing on remand was held on March 15, 1994. Before the hearing, Dr. Nancy Brennan, D.O., examined claimant at the request of Disability Determination Services. Dr. Brennan's assessment of claimant's fibromyalgia was consistent with Dr. Cross's assessment. Both limit claimant's lifting capacity to 15 pounds, and standing or walking to 15-20 minutes without interruption. Dr. Brennan also determined that claimant could sit for six hours without interruption. Dr. Brennan further limited claimant from kneeling, balancing, crouching, or crawling, and from lifting, carrying, reaching over her head, or handling objects heavier than a pound or two for any length of time. Dr. Brennan also noted that claimant should limit activities requiring reaching, pushing, and pulling. Dr. Brennan advised that claimant should avoid surroundings that cause

external stress to her system. Finally, Dr. Brennan reported that claimant demonstrates a lapse of concentration and memory.

Claimant, her husband, Dr. Peter Moulton, Ph.D., and a vocational expert testified at the remand hearing. Claimant's testimony was substantially the same as in the first hearing, but she added that she had difficulty concentrating due to her pain. Her husband confirmed that testimony.

Dr. Moulton testified that claimant has a moderate limitation on daily activities, a slight limitation on social functioning, a high limitation in concentration, persistence or pace, and no limitation of deterioration or decompensation. He further testified that although claimant's impairments seriously limit her ability to function, they do not preclude work. Dr. Moulton also testified that claimant has an adjustment disorder brought on by pain from the fibromyalgia.

Although new evidence was presented at the second hearing, the vocational expert's testimony remained the same. The ALJ posed a hypothetical based on the reports of Dr. Brennan and Dr. Moulton. The vocational expert identified several jobs claimant could perform, such as telephone answering service operator and order clerk.

SUMMARY OF THE ALJ'S FINDINGS

The ALJ employed a five-step "sequential evaluation" process in evaluating claimant's disability.[1] The first step of the process requires the ALJ to determine whether claimant has been

[1] 20 C.F.R. § 416.920(a).

engaged in substantial gainful activity since her alleged onset of disability. Applying this criteria, the ALJ found that claimant's unsuccessful attempt to work after the onset of her disability was not substantial gainful activity.

Second, the ALJ must determine whether claimant has "severe" impairments which could impose more than a minimal limitation on the claimant's ability to perform basic work activities. Here, the ALJ found claimant to have "severe" impairments.

Third, the ALJ determined that claimant's impairments do not meet or equal any criteria in the Listing of Impairments of the musculoskeletal system because claimant did not provide appropriate physiological or psychological findings according to the listing requirements.

In the fourth step, the ALJ determine that claimant's impairments and consequent limitations prevented her from returning to her past relevant work as a baker, kitchen manager, or cook.

Last, the ALJ applied the Medical-Vocational Guidelines and determined that claimant retained the residual functional capacity for a modified range of light or sedentary unskilled work. Accordingly, the ALJ concluded that claimant is not under a "disability" as defined in the Social Security Act.

DISCUSSION

Claimant advances four arguments challenging the ALJ's findings. Claimant first argues that the ALJ failed to set forth specific and legitimate reasons for rejecting Dr. Cross's

findings. Claimant next argues that the ALJ's failure to make specific findings concerning the lack of credibility in her testimony is reversible error. Third, claimant asserts that the vocational expert's testimony was based on a hypothetical that did not include all of her limitations as described by her treating physician. Finally, claimant argues that the vocational expert's testimony is directly contrary to the Dictionary of Occupational Titles and Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles.

DISCUSSION

I. The ALJ Properly Based His Conclusion on the Evidence Presented.

In disability cases, the treating physician's opinion is given deference because the treating physician "'is employed to cure and has a greater opportunity to know and observe the patient as an individual.'" Magallanes, 881 F.2d at 751. A treating physician's opinion is not, however, necessarily conclusive "as to either a physical condition or the ultimate issue of disability." Id. Indeed, "[t]he ALJ may disregard the treating physician's opinion whether or not that opinion is contradicted." Id. This is particularly true where the opinion is "'brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion.'" Id. (citation omitted).

To reject the opinion of a treating physician, the ALJ must make findings setting forth specific, legitimate reasons that are based on substantial evidence in the record. "'The ALJ can meet

this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.'" Magallanes, 881 F.2d at 751, quoting Cotton v. Bowen, 799 F.2d 1403, 1408 (9th Cir. 1986); see also Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987).

Claimant testified that she is active for more than two hours a day on a regular basis. That testimony directly contradicted Dr. Cross's report that claimant could work no more than two hours a day. Because of claimant's contradictory testimony, the ALJ rejected Dr. Cross's opinion. The ALJ did not err in rejecting Dr. Cross's report on that basis.

II. The ALJ's Finding that Claimant Lacked Credibility is Substantiated by the Evidence.

Credibility determinations ordinarily are within the province of the ALJ. See Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989). However, "once the claimant produces objective medical evidence of an underlying impairment, an adjudicator may not reject a claimant's subjective complaints based solely on a lack of objective evidence to fully corroborate the alleged severity of pain." Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Nonetheless, "an adjudicator may find the claimant's allegations of severity to be not credible [provided that] the adjudicator * * * specifically makes[s] findings which support this conclusion." Id. In his findings, the ALJ noted that claimant's testimony was incongruous to her alleged pain:

> She was capable of attention to all questions asked, and her responses were rational, although somewhat evasive. . . . [S]he no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony.

The above reasons constitute specific findings and are sufficient to support the ALJ's conclusion that claimant's allegations of back pain were not credible.

III. The ALJ's Hypothetical Questions were not Improper.

The ALJ's hypothetical questions incorporated all of claimant's relevant limitations as presented by Dr. Brennan and Dr. Moulton. As stated above, the ALJ disregarded Dr. Cross's report because of claimant's contradictory testimony. The ALJ was not, therefore, required to incorporate Dr. Cross's findings in the questions posed to the vocational expert. The ALJ's hypothetical questions were not improper.

IV. The Vocational Expert's Testimony is Contrary to Dr. Brennan's Report.

Because claimant proved that her condition prevents a return to her previous occupation, the Secretary has the burden to show that the claimant can engage in substantial gainful work in the economy. Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993) (citing Gallant v. Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984)).

Although Dr. Brennan reported that claimant's ability to reach is impaired, the occupations identified by the vocational expert require frequent or constant reaching. The ALJ did not reject Dr. Brennan's assessment that claimant's ability to reach is impaired. Consequently, the ALJ's conclusion that claimant

was capable of performing other substantial gainful activity was not supported by substantial evidence because he only considered occupations which require movement beyond claimant's limitations. Accordingly, the Secretary has not sustained her burden of showing that claimant can engage in substantial gainful work in the economy, and the case must be remanded.

CONCLUSION

Based on a review of the record, the Secretary did not sustain her burden of proof in step five of the five-step evaluative process in determining whether claimant is entitled to benefits. IT IS ORDERED that this case be REMANDED to the Secretary for further proceedings in accordance with this opinion.

DATED this 20th day of April, 1995.

ROBERT E. JONES
United States District Judge

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Sandra K. Forney (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner)	546-66-9538 (Social Security Number)

This case is before me on an order from the Appeals Council, remanding the case for further proceedings, including a new hearing. The claimant's application for disability insurance benefits was filed on November 18, 1991. She alleged that she had been disabled since June 7, 1991, due to fibrositis. Following proper notice, a hearing was held on January 13, 1993, in Bend, Oregon, after which I issued a decision denying entitlement to benefits. The claimant, who was unrepresented at the first hearing, has now obtained counsel, Philip H. Garrow, Attorney at Law.

A supplemental hearing was held on March 15, 1994, in Bend, Oregon, at which the claimant appeared personally and testified. She was represented by her attorney. Leon Forney, the claimant's husband, testified on her behalf. Peter G. Moulton, Ph.D., testified as a medical expert. Richard C. Ridenour testified as a vocational expert.

In deciding whether or not the claimant is disabled, I must follow a step-by-step evaluation process set forth in the regulations at 20 CFR 404.1520 and 416.920. The first step of this process asks whether or not the claimant has engaged in substantial gainful work activity since the alleged onset date of disability. The claimant has continued to be unemployed since her first hearing. Prior to that time, as noted in the previous decision, she worked as a kitchen manager, baker and cook from September 4, 1991 to October 2, 1991 and earned approximately $1600 (Exhibit 10). Under the regulation at 20 CFR 404.1574(b),

I find that the claimant's work activity was an unsuccessful work attempt and not substantial gainful activity. The claimant met the insured status requirements of the Social Security Act on June 7, 1991, her alleged onset date, and she will continue to meet those requirements through December 31, 1995.

The second step in the evaluation process asks whether or not the claimant has a "severe" impairment within the meaning of the Social Security Act. An impairment is considered to be "severe" if it imposes more than a minimal restriction on an individual's capacity to perform work related activity (20 CFR 404.1521 and 416.921).

In December 1991, the claimant alleged that she was forced to stop working because of continuous pain. However, she stated that she did laundry once a week, cleaned the bathroom once a week, did the dishes once a day, made the bed once a day, and swept, mopped, and vacuumed occasionally. She also did shopping for small food items and her husband helped her with shopping once a week for larger articles. She walked up to two miles a day and did water exercises.

At the supplemental hearing, the claimant testified that every day except Sunday she does water aerobics and simple stretching exercises. Also daily, she does some housework, approximately one hour, makes one trip to the store, reads, and cooks meals, although she sometimes burns pots when cooking dinner. She walks five blocks three times a week to visit her parents, and her children and grandchildren come to see her two to three times a month. Walking causes burning in her muscles, but she does not have any problems with her forearms. She described fatigue which occurs between one and two p.m., and stated that she has to lie down and rest then. She said that her doctor agrees that she cannot return to work. Her medications include amitriptyline, ibuprofen, Premarin, and Flexeril, and she does not have headaches as long as she takes ibuprofen. She testified that she could not sleep prior to the introduction of amitriptyline and Flexeril, but now sleeps between 11:00 and 7:30 a.m. She said that she feels more energetic mentally, but her concentration is still poor.

The claimant's husband testified that he used to come home and find the claimant crying. He stated that she cannot drive their pickup truck and that he goes shopping with the claimant and carries groceries.

The claimant's treating physician is Steven W. Cross, M.D. As discussed in the previous decision, he has treated the claimant since 1988, although her findings were minimal at that time. On July 26, 1991, his chart notes reveal that her fibrositis and hypertension were controlled. However, on October 7, 1991, he reported that she was no longer able to work because the pain was too great for the amount of time she spent on her feet. He continued to describe her as incapable of working as a cook or a baker through January 6, 1992, and said that she was unable to stand for more than 15 minutes at a time, walk for more than 20 minutes at a time, lift more than 15 pounds, or carry more than 15 pounds for more than 30 feet. He stated that she could "maybe" work two hours of an eight hour day. However, thereafter he reported that the claimant was walking two miles a day and doing water aerobics. She was able to sleep at night because she took Flexeril and amitriptyline. A sedimentation rate, ANA test, and a rheumatoid factor rate were all negative. On August 14, 1992, Dr. Cross' diagnosis was fibrositis, presently controlled, and he indicated that he would only need to see the claimant every three months (Exhibits 15, 19 and 21).

Additional evidence submitted by the claimant reveals that she saw Paul H. Altrocchi, M.D., for complaints of headaches, neck pain and back aches in 1985, and was prescribed short-term bed rest and Robaxin (Exhibit 31). The claimant's disability retirement was approved by the Oregon Public Employees Retirement System on February 24, 1992 (Exhibit 33).

On May 4, 1992, the claimant saw James W. Greenough, Ph.D., for a psychological assessment at the request of Disability Determination Services. She gave the impression of at least average intellectual potential, with some loss of memory and concentration abilities secondary to her preoccupation with pain. She described her mood as somewhat depressed, but less so since she had been taking antidepressant medication over the last year. The diagnoses were adjustment disorder with depression and characteristics of a dependent personality disorder (Exhibit 16).

In September 1992, the claimant saw Terry L. Schrader, M.D., for a psychiatric evaluation, at which she reported that she had been unable to continue working as a cook/manager since October 1991. She described herself as initially in a state of denial and stated that she experienced a certain amount of depression, but was now following an active schedule pursuant to her doctor's orders. She found walking up to two miles a day, water exercise, and a jacuzzi tub to be the most helpful. She took a lot of time

to do her housework, but she got it done. She slept between midnight and seven or eight a.m., and usually rested during the day. Her medications included amitriptyline, Flexeril, ibuprofen, Premarin, and an anti-hypertensive medication, and she described them as helpful, although the amitriptyline caused mild side effects such as a dry mouth. Dr. Schrader found her MMPI profile to be valid, with no evidence of a tendency to exaggerate her symptoms, and consistent with mild depression and her diagnosis of fibrositis. The claimant believed that her pain management was better than it was a year ago, although she still had pain complaints. She stated that pain "no longer controlled her life" (Exhibit 32).

On December 6, 1993, the claimant saw Nancy L. Brennan, D.O., for a physical examination at the request of Disability Determination Services. The claimant described her two major complaints as generalized muscular pain and muscular weakness. On physical examination, Dr. Brennan noted slow gait, but no foot drop or antalgic gait, and she was able to balance herself on one foot. She had a significant number of tender points, consistent with fibromyalgia. She had reduced range of motion of her shoulder and gross tremor of the tested extremity with exertion. Her cervical range of motion was normal; however, when she flexed her lumbar spine greater than 90 degrees, she did not have the muscle strength to pull her trunk erect and used her hands to "walk" up her thighs. Her quadriceps were unable to raise her body from a squatting position; she had difficulty rising from a low seated position; and she was unable to perform this maneuver repetitiously. Dr. Brennan opined that the claimant would be unable to sit, stand, or walk for any appreciable length of time without shifting or weight or moving about to a new position. She was sure that she would be unable to lift, carry, reach over her head, or handle objects heavier than a pound or two for any length of time. She also exhibited a lapse of concentration and some lapses in her memory (Exhibit 34, pages 1-4).

However, on a medical assessment of the claimant's ability to do work-related activities, Dr. Brennan stated that the claimant could occasionally lift 10-15 pounds, could stand/walk for a total of two to three hours in an eight hour day, 15 minutes at one time, and could sit for a total of six hours in an eight hour day, 45 minutes at one time. However, she noted that the limitations on sitting were by patient-given history, and there was no evidence of limitation on examination. She thought the claimant could occasionally climb and stoop, but never kneel, balance, crouch or crawl. She said that reaching and pushing and

pulling would aggravate the claimant's trigger points. She noted that the claimant should not be around temperature extremes or noisy environments, because external stress to the system often causes exacerbation of fibromyalgia symptoms (Exhibit 34).

Dr. Cross' chart notes reveal that he saw the claimant in March 1993 for a follow up on her blood pressure, which needed medication adjustment, and in April 1993, for a follow up on her fibrositis. In April she reported that she was feeling better on Daypro, and having less burning in her stomach. In July 1993 she revealed that she was walking two miles a day, doing water aerobics, and taking her medication. She did some housework, usually dishes, and occasionally had a day where she could clean the whole house, but then would suffer for it the next day. She was maintaining a good attitude and Dr. Cross described her fibromyalgia as chronic and stable. On October 27, 1993, Dr. Cross reported that she was still exercising, and on February 1, 1994 he stated that she was doing six days a week of water aerobics and staying active. She said that she did not want to end up like other people with the problem in wheelchairs and walking aids. At the last notation, her medications included ibuprofen, amitriptyline, Premarin, and calcium (Exhibit 37).

On February 9, 1994, the claimant received a physical capacity evaluation from Physical Therapy Associates. The claimant described morning stiffness and symptoms primarily aggravated by prolonged static posture or bending and lifting activity. Her current daily activities included minimal housework with delayed soreness, water aerobics class, and walking up to two miles per day. The claimant demonstrated significant deconditioning in her extremities and trunk for repetitive bending, sustained stand/walk, and repetitive materials handling tolerance. The evaluator thought that the claimant was limited to part-time sedentary work; however, of the three factors considered, only one involved consideration of her "poor to fair" pain management. The other two were her deconditioning and her length of time off of work (Exhibit 38). The claimant's deconditioning for repetitive materials handling, the only portion applicable to sedentary work, was based upon her performance on timed tests which are subject to equivocal exertional efforts and possibly distorted results. Additionally, deconditioning may be related to the time lapsed since active employment. Although considered a factor for certain portions of disability assessment, such as the transferability of acquired work skills from jobs which were performed over 15 years in the past, the relatively short period of time the claimant has been unemployed would not be a factor in

her evaluation for Social Security purposes. Therefore, although the claimant's limitation to sedentary or limited light work has been established and confirmed by observation and is not unusual for her diagnosis, her limitation to part-time work found by this evaluation is considered to be based upon subjective factors within the control of the individual. As will be further discussed below, I find that the claimant is prone to exaggeration of her restrictions and subjective symptomatology, and that therefore a limitation to part-time work is not reasonable under the circumstances and not supported by the other evidence of record.

At the hearing, Peter Moulton, Ph.D., testified as a medical expert. He stated that the claimant's diagnoses are fibrositis and mild dysthymia, which has been helped by medication. He thought that she had moderate limitations on her activities of daily living and slight difficulties in maintaining social functioning, but that she often had deficiencies of concentration, persistence, or pace. He said that she was moderately limited in her ability to understand, remember and carry out detailed instructions, her ability to maintain attention and concentration for extended periods, and in her ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. He did not think that she was significantly limited in any other categories.

Upon consideration of the evidence in its entirety, I find that the record establishes a combination of severe impairments that impose more than a minimal limitation on the claimant's ability to perform basic work activities (Exhibit 25 and 20 CFR 404.1520(c), 404.1520a(c) and 404.1521). However, these impairments do not meet or equal any of the criteria of the Listing of Impairments contained in Appendix 1, Subpart P, Regulations No. 4.

The claimant's fibrositis has been evaluated under the Listings at 1.00 et seq. for the musculoskeletal system. Other than complaints of pain, the claimant does not have the appropriate abnormal signs or laboratory findings required to satisfy the requirements of any Listing under this section. The claimant's mental symptomatology does not meet or equal the requirements of any of the impairments for mental disorders, as documented in the evidence of record and confirmed by Dr. Moulton's testimony. A psychological review technique form has been prepared reflecting

this determination and is attached to this decision. As disability is not established pursuant to the criteria of 20 CFR 416.920(d), further evaluation in this claim requires an assessment of the claimant's residual functional capacity.

In assessing the claimant's residual functional capacity, consideration has been given to the claimant's testimony regarding pain and discomfort. Pain, when associated with a medically determinable impairment which could produce pain, may be of such severity as to cause an individual to be under a "disability." However, the inability of a claimant to work without some pain and discomfort does not necessarily satisfy the test for disability under the provisions of the Act. Kroeneke v. Richardson, 363 F.Supp. 891 (D.Or.1973); Valdez v. Heckler, 616 F.Supp. 933, 940 (D.C.Cal.1985).

As noted in Social Security Ruling 88-13, the related "symptoms" of pain are the individual's own perception of the effects of the physical or mental impairment. Because of the subjective characteristics of symptoms and the absence of reliable techniques for measurement, symptoms (especially pain) are difficult to prove, disprove or quantify. This ruling notes a need for a sound medical basis for the disability decision as well as consideration of the claimant's symptoms. The ruling, which is binding upon an Administrative Law Judge in the consideration of symptoms (including pain) in the evaluation of disability cases (20 CFR § 422.406(b)(1)), reiterates the policy set forth in the Social Security Regulations (20 CFR § 404.1529 and § 416.929), which provide that pain cannot be found to have a significant effect on a disability decision unless medical signs or laboratory findings show that a medically determinable physical or mental impairment is present that reasonably could be expected to produce the pain alleged.

In determining the level and severity of pain, pertinent evidence has been considered such as: descriptions of the claimant's daily activities; frequency, amounts and effects of any medications; the claimant's appearance and credibility; any comments of physicians appearing of record; objective clinical laboratory findings, or the lack thereof; and the existence or nonexistence of any observable signs or significant pathological abnormalities associated with and resulting from severe and intense pain. If it is found that a claimant's testimony relating to the intensity of his or her pain and other limitations is unreliable, a credibility determination is to be made citing the reasons why the testimony is unpersuasive.

Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991). In this regard, questions of credibility and resolutions of conflicts in the testimony are functions solely of the Secretary. Yuckert v. Bowen, 841 F.2d 303, 307 (9th Cir.1988); Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir.1982); Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir.1971).

In accordance with the criteria set forth above, the record fails to document incapacitating symptomatology to the extent and degree alleged by the claimant. The record reflects significant discrepancies and/or omissions between the claimant's reports to various medical personnel and to the Agency. She alleges severe, incapacitating pain in one instance, and then, on another, states that her condition has undergone significant improvement with treatment and medication. She told Dr. Schrader that her pain management was better than it was a year previously, and that pain no longer controlled her life, a statement which is substantially reproduced in her reports to Dr. Cross, and yet she told Dr. Brennan that her generalized muscular pain was a "10" on a scale of 1 to 10. In the latter instance, she was aware that she was undergoing a physical examination with emphasis on evidence of fibrositis and its severity.

While it is essentially uncontroverted that the claimant is incapable of returning to work as a managerial cook, work which she described as involving standing up to seven hours a day and frequently lifting up to 50 pounds (Exhibit 9), despite her allegations, the record does not establish the legitimacy of her other complaints. Even after considering her assertions of extreme pain, Dr. Brennan found that she was capable of sitting for up to six hours a day, walking or standing up to three hours a day, and occasionally lifting 10 to 15 pounds. The physical capacities evaluation likewise found that she was capable of sedentary work, and, although a further reduction to part-time work was noted, that reduction was based upon tests which are capable of distortion based upon equivocal effort, as previously discussed.

The claimant's activities are commensurate with a capacity for sedentary work, and even occasional light work. Another example of her somewhat misleading testimony is that she failed to mention at the hearing that she can occasionally clean her whole house in one day. Her list of daily activities is quite broad, and while it is noted that she does not drive, apparently the only vehicle available is a pick-up truck. She does housework, exercises, cooks, reads, and goes shopping daily. She does more

extensive activities several times a week. The record does not support a conclusion that she must lie down for a protracted period every day, and Dr. Brennan did not note such a significant disruption in her ability to perform activities during the day. Therefore, I conclude that this resting period is not medically imperative.

I do not find the claimant's testimonial reports or subjective reporting of her capacity to be the most reliable evidence of record upon which to base an assessment of her residual functional capacity. The only physician to currently render a physical capacities evaluation is Dr. Brennan, and her assessment indicates that the claimant is capable of working. Dr. Cross has not recently expressed an opinion, and subsequent to his statement that the claimant might be limited to two hours per day (with apparent reference to her work as a cook), he has repeatedly reported that her condition has improved or stabilized. Even the claimant herself acknowledges that she is capable of more activity than that encompassed by two hours per day. In fact, she does at least two hours of work per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. Although the claimant stated that her doctor supports her contention that she cannot return to work, it is conceded that she cannot return to work as a baker or a cook. Other work is not precluded by a statement that she could not return to work she had been doing in the past.

The claimant's demeanor at the hearing was not indicative of an individual who is experiencing disabling incapacity; she did not appear to be in pain or require a period in which to rest. She was capable of attention to all questions asked, and her responses were rational, although somewhat evasive. Her medications are very conservative, but even this conservative treatment has produced considerable relief of her symptoms. For example, she no longer has difficulty sleeping regularly, she no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony. Upon consideration of the evidence in its entirety, I find that the subjective reports of the claimant and her witness are not credibly supported by the weight of the evidentiary record to the extent alleged pursuant to the criteria of SSR 88-13.

I find that the claimant is capable of sedentary or light work within the ranges described below; however, based upon the testimony of the vocational expert at the hearing, and as

previously discussed above, this precludes the performance of her past relevant work. If the claimant cannot return to her past relevant work, then the Secretary must assume the burden of showing that despite her impairments and in light of her age, education and work experience, there is still other work she can perform, which exists in significant numbers in either the claimant's regional economy or in the national economy or both.

At the hearing, Richard Ridenour testified as a vocational expert. Although he stated that the claimant could not perform her past relevant work as a head cook, a baker, or manager of a school lunch room program if she were limited to the sedentary or light exertional level, he testified that the claimant has acquired skills from that work which are transferable to other semi-skilled work. He identified these skills as involving public contact and service to the public. The claimant is 47 years old and has the equivalent of a high school education. She was 44 years old at her alleged onset date. Given a hypothetical question limiting the claimant to work that does not involve lifting more than 15 to 20 pounds or walking more than two miles, and which allows her the ability to stand and change position at will, and also considering her vocational factors, Mr. Ridenour testified that the claimant could perform work as an order clerk and a telephone answering service operator. Given an additional hypothetical question limiting the claimant in accordance with the functional capacity assessment described by Dr. Brennan and further considering the limitations described by Dr. Moulton at the hearing, in addition to her vocational factors, Mr. Ridenour testified that she could still perform the jobs in question. Finally, given a hypothetical question based upon the physical capacity evaluation performed by Physical Therapy Associates, found in Exhibit 38, in addition to the same psychological limitations and vocational factors, Mr. Ridenour's testimony remained unchanged. As I have determined that the claimant can perform sedentary work as described on a full-time basis, she would be able to perform the jobs of order clerk and answering service operator full-time. Mr. Ridenour testified that there are over 850,000 such jobs in the national economy.

In summary, I find that the jobs delineated by the vocational expert support a conclusion that the claimant has had the ability to perform a wide range of sedentary work existing in significant numbers in the national economy during the period relevant to this adjudication. Therefore, the framework of Rules 201.21 and 201.22 of Appendix 2, Subpart P, Regulations No. 4 directs a

conclusion that she is not under a disability. Accordingly, I find that the claimant is "not disabled," as defined by the Social Security Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on June 7, 1991, the date the claimant stated she became unable to work, and will continue to meet them through at least December 31, 1995.

2. The claimant has not engaged in substantial gainful activity since June 7, 1991.

3. The medical evidence establishes that the claimant has a combination of severe impairments, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's testimony, and that of her husband, was not fully credible.

5. The claimant has the residual functional capacity to perform work as described in the decision above (20 CFR 404.1545).

6. The claimant is unable to perform her past relevant work as a head cook, a baker, and a manager of a school lunch room program.

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the limitations described in the decision above.

8. The claimant is 47 years old, which is defined as a younger individual (20 CFR 404.1563).

9. The claimant has the equivalent of a high school education (20 CFR 404.1564).

10. Considering the claimant's younger age, transferability of skills is not a material factor in the determination of disability; however, the claimant has acquired work skills which are transferable to other semi-skilled work, such as working with and serving the public.

11. Based on an exertional capacity for sedentary work, and the claimant's age, education, and work experience, section 404.1569 and Rules 201.21 and 201.22, Table No. 1, Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of "not disabled."

12. Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary work, at the hearing a vocational expert testified that there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: food and beverage order clerk and telephone answering service operator. There are over 850,000 such jobs in the national economy.

13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f)).

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on November 18, 1991, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

STEPHEN P. KRAMER
Administrative Law Judge

APR 18 1994
Date

DEPARTMENT OF HEALTH & HUMAN SERVICES — Social Security Administration

Refer to: S3GCM
546-66-9538

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Sandra K. Forney
61354 Blakley, Apt A1
Bend, OR 97702

Dear Ms. Forney:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on April 18, 1994.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council considered your attorney's brief dated June 8, 1994. He contended that the Administrative Law Judge's conclusions were not supported by substantial evidence; that he did not give adequate weight to the opinion of Steven W. Cross, M.D. (Exhibit 15) and that he did not properly assess your testimony about your symptoms. The hearing decision contains extensive rationale on the conclusions reached which cites clinical findings, medical opinion more recent than Dr. Cross' (Exhibits 34, 39), treatment, medication, daily activities and the evidence from medical and vocational experts. Accordingly, the Appeals Council finds no basis in your attorney's brief for changing the hearing decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel of the Department of Health and Human Services at 200 Independence Avenue, S.W., Washington, D.C. 20201. (See rules 4(c)(2) and (d)(4) and (5) of the Federal Rules of Civil Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

ORIGINAL SIGNED BY
Peter A. Greenlee
Administrative Appeals Judge

cc:
Philip H. Garrow, Esq.
HO, Eugene, OR (ALJ Kramer)

NOT FOR PUBLICATION

FILED

MAY 29 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANDRA K. FORNEY, Plaintiff-Appellant, v SHIRLEY S. CHATER, Secretary, Commissioner, Social Security Administration, Defendant-Appellee.	)	CA No. 95-35560 DC No. CV-94-06357 O R D E R

BEFORE: CANBY, RYMER and KLEINFELD, Circuit Judges

Appellant's petition for rehearing is DENIED.

ORIGINAL

No. 97-5737

Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER
OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
MARY K. DOYLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RECEIVED
SUPREME COURT U.S.
POLICE DEPARTMENT
NOV
A.M. P.M.
1 2 3 4 5 6 7 8 9 10 11 12 1 2 3 4 5 6

QUESTION PRESENTED

Whether an order of a district court under the fourth sentence of 42 U.S.C. 405(g) is subject to appeal by a Social Security claimant who is aggrieved by that order in that she sought outright reversal of the underlying administrative decision.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-5737

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER
OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 108 F.3d 228. The opinion of the district court (Pet. App. 15-25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1997. A petition for rehearing was denied on May 29, 1997. Pet. App. 41. The petition for a writ of certiorari was filed on August 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1991, petitioner applied for Social Security

disability benefits under 42 U.S.C. 416 and 423, alleging disability due to fibromyalgia and depression. Pet. App. 26. After extensive proceedings, an administrative law judge (ALJ) of the Social Security Administration (SSA) denied petitioner's claim on the ground that, although she was incapable of returning to her former line of work as a cook and kitchen manager, she was able "to perform a wide range of sedentary [jobs] existing in significant numbers in the national economy." Id. at 35. In making that determination, the ALJ rejected the medical opinion of petitioner's treating physician (who had supported her disability claim); found that petitioner's own testimony lacked credibility in critical respects; drew conclusions from a vocational expert's answers to hypothetical questions concerning petitioner's disabilities; and accepted that expert's testimony as to the kinds of work that petitioner was able to perform. Id. at 26-38; see also id. at 21-25. The SSA's Appeals Council denied petitioner's request for review. Id. at 39.

2. Petitioner sought judicial review in federal district court under 42 U.S.C. 405(g), requesting, as relief, "[t]hat th[e] court reverse and set aside the decision of [respondent] denying [petitioner's] claim for disability benefits." C.A. E.R. 242.[1] She contended, inter alia, that the ALJ should not have

[1] Petitioner also requested, "[i]n the alternative, that th[e] court remand the case back to the Secretary [of Health and Human Services] for proper evaluation of the evidence or a hearing de novo." Ibid. During the course of this litigation, the Commissioner of Social Security was substituted as the defendant for the Secretary of Health and Human Services.

rejected either her treating physician's opinion or her own testimony concerning her disability, and that the ALJ's hypothetical questions to the vocational expert were improper. The district court rejected each of those arguments. Pet. App. 22-24.

The district court nonetheless determined, as petitioner had argued, that the record did not support the ALJ's finding that petitioner was capable of performing certain identified jobs existing in the national economy. Those jobs, the court observed, required "frequent or constant reaching," and the ALJ had not rejected another physician's "assessment that [petitioner's] ability to reach is impaired." Id. at 24. Thus, because "the Secretary has not sustained her burden of showing that claimant can engage in substantial gainful work in the economy," the court remanded the case for further proceedings pursuant to sentence four of 42 U.S.C. 405(g), see Pet. App. 25, which authorizes a district court to enter "a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."[2] See also C.A. E.R. 257 (final judgment).

[2] A "sentence-four" remand terminates the litigation, such that a claimant must file a new civil action if he wishes to contest the agency's post-remand determinations. See Sullivan v. Finkelstein, 496 U.S. 617 (1990). In that and other respects, a sentence-four remand is "entirely different" from a remand under the sixth sentence of Section 405(g). Id. at 626. Sentence six provides, inter alia, that the district court may remand the case to the agency either when (for good cause) the Commissioner requests the remand before filing an answer or when the district court learns of material new evidence that was not available to the claimant at the time of the prior administrative

3. Petitioner appealed the district court's order, renewing her contention that, if she prevailed on the issues the district court had resolved against her, the agency's decision should be reversed outright and the case should be remanded solely for payment of benefits, not for additional administrative proceedings on the merits. See Pet. C.A. Br. 18 ("the agency's decision should be reversed and [petitioner] should be found disabled"); see also id. at 35; Pet. 2, 10. The court of appeals dismissed the appeal on procedural grounds. Pet. App. 1-13.[3]

The court first acknowledged that, under Sullivan v. Finkelstein, 496 U.S. 617 (1990), an order under sentence four that sets aside the Commissioner's decision denying benefits and remands to the Commissioner for further proceedings on the merits of the claim is a "final judgment" with respect to all parties. Pet. App. 10. Moreover, under sentence eight of 42 U.S.C. 405(g), that order "shall be subject to review in the same manner

---

proceeding. A district court that has granted a sentence-six remand retains jurisdiction of the case while the administrative proceedings are pending. Sentences four and six of 42 U.S.C. 405(g) provide the exclusive means by which a district court reviewing a final agency decision denying Social Security benefits may remand the case to the agency for further proceedings. See generally Melkonyan v. Sullivan, 501 U.S. 89, 97-98 (1991).

[3] In its brief, the government had asked the court of appeals to address petitioner's claims on the merits. See Gov't C.A. Br. 1 (asserting that the district court's remand order is a "final" and "appealable" order, "over which this court has jurisdiction pursuant to 28 U.S.C. § 1291"). We have been informed, however, that at oral argument, after the court had given notice of its intent to address the issue, counsel for the government contended that petitioner's appeal should be dismissed on procedural grounds.

as a judgment in other civil actions." See Finkelstein, 496 U.S. at 625. The court nonetheless held that the finality of the district court's judgment in this case "does not necessarily entitle [petitioner] to appeal the district court's decision," because "[a] prevailing party normally may not appeal the decision in its favor." Pet. App. 10. "There can be little doubt," the court continued, "that a claimant 'prevails' * * * when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed." Ibid. The court reasoned that, on remand, petitioner might secure all the relief she seeks and, "[i]f she does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record." Ibid.[4]

Finally, the court of appeals rejected petitioner's argument that, if she were awarded no benefits on remand and had to bring an entirely new civil action to challenge that adverse decision, principles of res judicata and collateral estoppel would bar her from challenging the district court's adverse rulings in the

---

[4] The court of appeals acknowledged that "there may be instances when a claimant is foreclosed by the district court's remand decision from part of the benefits sought, and would then seek an appeal from the remand decision on the ground that broader relief should have been awarded. See Finkelstein, 496 U.S. at 623 n. 3." Pet. App. 10 n.5. The court expressed no view as to the claimant's right to appeal in that context. Ibid.

present action. Pet. App. 12. The court explained that, even though the district court might well adhere to its earlier rulings in the subsequent action, the critical question is whether petitioner could challenge those rulings on appeal. The court concluded that she would be entitled to do so, both because it would be "inappropriate to hold [her] to rulings that she was precluded from appealing," and because, in its view, the issues as to which she would seek appellate review in the subsequent action would not have been "essential to the judgment in the prior case." Ibid.

ARGUMENT

Petitioner contends that the court of appeals' dismissal of her appeal is inconsistent with the plain language of 42 U.S.C. 405(g) and with this Court's decision in Sullivan v. Finkelstein, 496 U.S. 617 (1990). We agree.

1. The question presented in Finkelstein was whether the Secretary of Health and Human Services could immediately appeal an order entered under sentence four of Section 405(g) that set aside the Secretary's denial of benefits (thereby essentially invalidating the regulations on which the Secretary relied) and remanded the case to the Secretary for further proceedings on the merits of the claim without regard to the challenged regulations. 496 U.S. at 624. This Court answered that question in the affirmative, noting, among other things, that a contrary ruling would produce an anomalous result: "should the Secretary on remand undertake the inquiry mandated by the District Court and

award benefits, there would be grave doubt * * * whether he could appeal his own order." Id. at 625. The Court also noted that it "express[ed] no opinion about appealability" in circumstances where "the person seeking judicial review * * * seek[s] to appeal on the ground that broader relief should have been granted by the district court." Id. at 623 n.3.

Nonetheless, the Court did not limit its reasoning concerning the finality of sentence-four remand orders to circumstances in which the party seeking to appeal such an order is the government rather than the claimant. Instead, it focused on the text of Section 405(g), see 496 U.S. at 627-629, which expressly declares, in sentence eight, that any sentence-four judgment providing for a remand is "final except that it shall be subject to review in the same manner as a judgment in other civil actions." As the court of appeals recognized, "to conclude that a sentence-four remand is not final for the claimant is analytically untidy; it is flatly inconsistent with the Supreme Court's insistence in Finkelstein that a sentence-four remand terminates the civil action." Pet. App. 9-10; see also Shalala v. Schaefer, 509 U.S. 292, 295-297 (1993) (upon issuing sentence-four remand order, district court may not retain jurisdiction pending completion of administrative proceedings). For that reason, "[t]he civil action ending in a sentence-four remand * * * must be 'final,' in a formalistic sense, for all parties to it." Pet. App. 10.

We indicated our agreement with that position in our

principal brief on the merits in Finkelstein. We there observed that, under "the language of Section 405(g) deeming an order like that entered here to be a final judgment subject to appeal in the same manner as a judgment in other civil actions, such decisions may well be appealable by a claimant who could show that he was aggrieved by a ruling of law by the district court -- e.g., that if the court's ruling was in error he was entitled to outright reversal of the Secretary's decision." No. 89-504 U.S. Br. 21 n.17; see also p. 10, infra. In our view, this Court's ensuing decision in Finkelstein effectively compels that conclusion.

2. Although the court of appeals recognized the finality of the district court's judgment, it nonetheless dismissed petitioner's appeal on the grounds that "[a] prevailing party normally may not appeal the decision in its favor" and "[t]here can be little doubt that a claimant 'prevails' * * * when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed." Pet. App. 10. In our view, that principle is framed too broadly, and the court of appeals erred in applying it to dismiss the appeal in this case.

"Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 333 (1980); see also INS v. Chadha, 462 U.S. 919, 930 (1983); Electrical Fittings Corp. v. Thomas & Betts Corp., 307

U.S. 241, 242 (1939); 20 Moore's Fed. Prac. § 303.10[2][b], at 303-19 to 303-20 (3d ed. 1997); cf. Perez v. Ledesma, 401 U.S. 82, 87 n.3 (1971). In this case, petitioner sought an outright reversal of the agency's denial of disability benefits and an affirmative determination that she was entitled to those benefits; only as an alternative and lesser remedy did she seek a remand for further administrative proceedings on the merits of her claim. See pp. 2-4 and note 1, supra. While it is true, as the court of appeals observed, that those proceedings might ultimately "result in an award of all of the benefits claimed," Pet. App. 10, the district court's remand order deprives petitioner of the immediate and certain benefits to which she would now be entitled if the district court had granted her the outright reversal she had requested. We therefore agree with petitioner that, under principles generally applicable to "other civil actions," 42 U.S.C. 405(g), she was sufficiently aggrieved by the district court's disposition of this case that she is entitled to appellate review of the judgment. Cf. Nguyen v. Shalala, 43 F.3d 1400, 1402 n.2 (10th Cir. 1994); Pet. App. 11 n.6 (discussing Nguyen).[5]

---

[5] Petitioner would be deemed a "prevailing party" for purposes of an application for attorney's fees under 28 U.S.C. 2412(d)(1)(B). See Schaefer, 509 U.S. at 300-302. As the court of appeals recognized, however, "the status of prevailing party for purposes of attorney's fees * * * does not automatically equate with status as prevailing party for purposes of appeal." Pet. App. 11. Indeed, for the latter purpose, the issue is not whether the party "prevailed" in the district court, but whether she is "aggrieved" by that court's judgment. For example, if the district court had resolved every issue in this case on the merits and had determined that petitioner was entitled to some

The practical consequence of our position regarding the jurisdiction of a court of appeals over a Social Security claimant's appeal in circumstances such as these are likely to be limited. As we observed in Finkelstein, even where claimants do have a right to appeal from a sentence-four remand order, such appeals "would surely be infrequent" for three reasons:

> First, the district court's order finding the Secretary's decision to have been legally erroneous and remanding the cause to the Secretary for further proceedings generally represents a substantial victory for a claimant. Second, any additional gains from a time-consuming appeal are unlikely, because a district court's conclusion that further proceedings should be conducted by the Secretary before there is a final resolution of the claim for benefits would be subject to only the most limited review by a court of appeals. Third, and by way of contrast, the claimant has a very good prospect of prevailing in the proceedings on remand: we have been informed by the Department of Health and Human Services that, following additional development of the record on remand, benefits are awarded in approximately 65% of Social Security cases that are remanded to the Secretary.

No. 89-504 Br. 21 n.17.[6] In this case, however, petitioner has

---

but not all of the benefits she has sought, petitioner would qualify as a "prevailing party" for purposes of attorney's fees, but she would also have a right to appeal the judgment to seek additional benefits.

[6] In our view, when either the claimant or the Commissioner forgoes an appeal in favor of further administrative proceedings, neither will normally be barred, in a subsequent action under Section 405(g) seeking judicial review of the Commissioner's new decision on remand, from raising issues resolved against him in the first district court action. While the second round of judicial review would be a new civil action in court, there is but one underlying administrative proceeding before the Secretary on the application for benefits. In these circumstances, we do not believe that the second round of judicial review is sufficiently separate from the first round to trigger application of claim or issue preclusion. To be sure, in the second round of judicial review, the district court, applying law-of-the-case-type principles, see Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997), might choose not to revisit issues it resolved in the

sought to appeal the district court's remand order. We believe that she is entitled to do so, even though the district court's conclusion -- that further administrative proceedings are necessary before there can be a final resolution of her claim -- "is subject to only the most limited review by a court of appeals." Ibid.

---

first round of judicial review. But neither the district court nor the court of appeals would be altogether barred by issue or claim preclusion principles from doing so. A rigid rule of preclusion would create undesirable incentives to avoid participating in administrative proceedings on remand, even though such proceedings can provide the most efficient means of resolving a given dispute. For these reasons -- and in light of the special attributes of judicial review of agency action, in which the agency has primary jurisdiction and the matter ordinarily should be returned to the agency if the court finds a flaw in its decision, see FPC v. Idaho Power Co., 344 U.S. 17, 20-21 (1952); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 141 (1940) -- the relevant policy considerations do not support application of issue preclusion. See generally Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-333 (1979) (discussing centrality of policy concerns in determining scope of collateral estoppel doctrine); United States v. Mendoza, 464 U.S. 154 (1983) (discussing unique status of federal government for purposes of that doctrine).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the position asserted in this brief.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
MARY K. DOYLE
Attorneys

NOVEMBER 1997

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FORNEY, SANDRA K. Petitioner	)	
vs.	)	No. 97-5737
KENNETH S. APFEL, COMMISSIONER OF SSA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE RESPONDENT** by first class mail, postage prepaid, on this 26th day of November 1997.

RALPH WILBORN
1580 VALLEY RIVER DRIVE
SUITE 170
EUGENE, OR 97401

Seth P. Waxman proj

SETH P. WAXMAN
Solicitor General

November 26, 1997

RECEIVED
AFTER HOURS
NOV 26 1997
OFFICE OF THE CLERK
SUPREME COURT. U.S.

RECEIVED
SUPREME COURT U.S.
POLICE DEPARTMENT
NOV 20 1997
AM 7|8|9|10|11|12|1|2|3|4|5|6 PM

RECEIVED
SUPREME COURT U.S.
POLICE DEPARTMENT
NOV 20 [illegible]
AM 7|8|9|10|11|12|1|2|3|4|5|6 PM

AE 179
1845

(A)

Supreme Court, U.S.
FILED
FEB 19 1998
CLERK

No. 97-5737

In The

Supreme Court of the United States

October Term, 1997

SANDRA K. FORNEY,

Petitioner,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

RALPH WILBORN*
RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 Valley River Drive, Suite 170
Eugene, OR 97401
Telephone: (541) 485-4265
Counsel for Petitioner

SETH P. WAXMAN*
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
Telephone: (202) 514-2217
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed August 25, 1997
Certiorari Granted January 16, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

147pp

TABLE OF CONTENTS

Page

Relevant Docket Entries. 1

Application Of Sandra K. Forney For Disability Insurance Benefits, Dated 11/2/91 2

Notice Of Unfavorable Administrative Law Judge Decision, Dated April 18, 1994. 7

Complaint, Filed September 12, 1994 34

Answer, Filed November 29, 1994. 39

Plaintiff's Memorandum In Support Of Petition For Judicial Review, United States District Court For The District Of Oregon, Filed January 3, 1995 43

Opinion And Order, United States District Court For The District Of Oregon, Filed May 1, 1995 . . . 118

Judgment, United States District Court For The District Of Oregon, Filed May 24, 1995 129

Order Directing Parties To Be Prepared To Argue Jurisdiction, United States Court Of Appeals For The Ninth Circuit, Filed October 21, 1996. . . . 130

Opinion, United States Court Of Appeals For The Ninth Circuit, Filed March 4, 1997. 131

Order Of Supreme Court Of The United States Granting Certiorari And Leave To Proceed In Forma Pauperis, January 16, 1998. 145

RELEVANT DOCKET ENTRIES

I. United States District Court for the District of Oregon No. CV 94-6357-JO

5/1/95	9	OPINION AND ORDER DENYING REMANDING CASE to the Secretary for further proceedings [1] Signed 4/28/95 by Honorable Robert E. Jones microfilmed 5/2/95 (counsel notified) (tely) [Entry date 05/02/95]
5/24/95	10	JUDGMENT it is ORDERED AND ADJUDGED this case is REMANDED to the Secretary for further proceedings Signed 5/24/95 microfilmed 5/25/95 Honorable Robert E. Jones (cc: Counsel notified) (pegs) [Entry date 05/25/95]

II. United States Court of Appeals for the Ninth Circuit No. 95-35560

10/21/96	Filed PROMO order (Deputy Clerk: gb) In addition to their other arguments, the parties should be prepared to address at oral argument the question whether the decision of the dc is sufficiently final to give this court jurisdiction over the appeal * * * CITE * * * [95-35560] (sf)
3/4/97	FILED OPINION: DISMISSED (Terminated on the merits after Oral Hearing; Dismissed/Frivolous; Written, Signed, Published. William C. CANBY, author; Pamela A. RYMER; Andrew J. KLEINFELD.) FILED AND ENTERED JUDGMENT. [95-35560] (gail)
6/6/97	MANDATE ISSUED [95-35560] (gail)

EXHIBIT 1

APPLICATION FOR DISABILITY
INSURANCE BENEFITS

(Filed 11/18/91)

I APPLY FOR A PERIOD OF DISABILITY AND/OR ALL INSURANCE BENEFITS FOR WHICH I AM ELIGIBLE UNDER TITLE II AND PART A OF TITLE XVIII OF THE SOCIAL SECURITY ACT, AS PRESENTLY AMENDED.

MY NAME IS SANDRA K. FORNEY.

MY NAME AT BIRTH WAS SANDRA K. GREGSON.

MY SOCIAL SECURITY NUMBER IS 546-66-9538.

MY DATE OF BIRTH IS AUGUST 01, 1946.

I BECAME UNABLE TO WORK BECAUSE OF MY DISABLING CONDITION ON JUNE 07, 1991.

I AM STILL DISABLED.

NO PREVIOUS APPLICATION HAS BEEN FILED WITH THE SOCIAL SECURITY ADMINISTRATION BY OR FOR ME.

I HAVE NOT FILED NOR DO I INTEND TO FILE FOR ANY WORKERS' COMPENSATION, PUBLIC DISABILITY OR BLACK LUNG BENEFITS.

I AM NOT ENTITLED TO NOR DO I EXPECT TO BECOME ENTITLED TO A PENSION OR ANNUITY BASED IN WHOLE OR IN PART ON WORK AFTER 1956 NOT COVERED BY SOCIAL SECURITY.

THE SOCIAL SECURITY ADMINISTRATION AND THE STATE AGENCY REVIEWING MY CLAIM DOES HAVE MY PERMISSION TO CONTACT MY EMPLOYER(S).

I AM MARRIED TO LEON FORNEY, WE WERE MARRIED ON AUGUST 23, 1962 IN RENO NV BY A CLERGYMAN OR PUBLIC OFFICIAL. MY SPOUSE'S AGE OR BIRTHDATE IS, JANUARY 15, 1944 AND SOCIAL SECURITY NUMBER IS 572-56-8733.

I WAS NOT PREVIOUSLY MARRIED.

I DO NOT HAVE ANY CHILDREN WHO MAY BE ELIGIBLE FOR SOCIAL SECURITY BENEFITS ON THIS RECORD.

I UNDERSTAND THAT I MUST PROVIDE MEDICAL EVIDENCE ABOUT MY DISABILITY, OR ASSIST THE SOCIAL SECURITY ADMINISTRATION IN OBTAINING THE EVIDENCE.

I UNDERSTAND THAT I MAY BE REQUESTED BY THE STATE DISABILITY DETERMINATION SERVICES TO HAVE A CONSULTATIVE EXAMINATION AT THE EXPENSE OF THE SOCIAL SECURITY ADMINISTRATION AND THAT IF I DO NOT GO, MY CLAIM MAY BE DENIED.

I AUTHORIZE ANY PHYSICIAN, HOSPITAL, AGENCY, OR OTHER ORGANIZATION TO DISCLOSE ANY MEDICAL RECORD OR INFORMATION ABOUT MY DISABILITY TO THE SOCIAL SECURITY ADMINISTRATION OR TO THE STATE DISABILITY DETERMINATION SERVICES THAT MAY REVIEW MY CLAIM OR CONTINUING DISABILITY.

I AUTHORIZE THE SOCIAL SECURITY ADMINISTRATION TO RELEASE ANY INFORMATION ABOUT ME TO A PHYSICIAN OR MEDICAL FACILITY PREPARATORY TO AN EXAMINATION OR TEST. RESULTS OF

SUCH EXAMINATION OR TEST MAY BE RELEASED TO MY PHYSICIAN OR OTHER TREATING SOURCE.

I AUTHORIZE THAT INFORMATION ABOUT MY DISABILITY MAY BE FURNISHED TO ANY CONTRACTOR FOR CLERICAL SERVICES BY THE STATE DISABILITY DETERMINATION SERVICES.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION OF ALL EVENTS AS EXPLAINED TO ME.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION IF:

- MY MEDICAL CONDITION IMPROVES SO THAT I WOULD BE ABLE TO WORK, EVEN THOUGH I HAVE NOT YET RETURNED TO WORK.
- I GO TO WORK WHETHER AS AN EMPLOYEE OR A SELF-EMPLOYED PERSON.
- I APPLY FOR OR RECEIVE A DECISION ON BENEFITS UNDER ANY WORKERS' COMPENSTAION LAW OR PLAN (INCLUDING BLACK LUNG BENEFITS FROM THE DEPARTMENT OF LABOR), OR OTHER PUBLIC BENEFIT BASED ON DISABILITY.
- I AM IMPRISONED FOR CONVICTION OF A FELONY.

THE ABOVE EVENTS MAY AFFECT MY ELIGIBILITY TO DISABILITY BENEFITS AS PROVIDED IN THE SOCIAL SECURITY ACT, AS AMENDED.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION IF I BECOME ENTITLED TO A PENSION OR ANNUITY BASED ON EMPLOYMENT AFTER 1956 NOT COVERED BY SOCIAL SECURITY, OR IF SUCH PENSION OR ANNUITY STOPS.

MY REPORTING RESPONSIBILITIES HAVE BEEN EXPLAINED TO ME.

REMARKS:

MY EARNINGS FROM 1978 THROUGH 1990 ARE CORRECTLY POSTED. I WORKED FOR THE SAME EMPLOYER FROM 1974 THROUGH 10/91.

I KNOW THAT ANYONE WHO MAKES OR CAUSES TO BE MADE A FALSE STATEMENT OR REPRESENTATION OF MATERIAL FACT IN AN APPLICATION OR FOR USE IN DETERMINING A RIGHT TO PAYMENT UNDER THE SOCIAL SECURITY ACT COMMITS A CRIME PUNISHABLE UNDER FEDERAL LAW BY FINE, IMPRISONMENT OR BOTH. I AFFIRM THAT ALL INFORMATION I HAVE GIVEN IN CONNECTION WITH THIS CLAIM IS TRUE.

MY MAILING ADDRESS IS 61000 THE PINES
SP 572
BEND OR 97702

MY TELEPHONE NUMBER IS (503) 389-4849.

SIGNATURE /s/ Sandra K. Forney DATE 11-2-91

WITNESSES ARE REQUIRED ONLY IF THIS APPLICATION HAS BEEN SIGNED BY MARK (X) ABOVE. IF SIGNED BY (X), TWO WITNESSES TO THE SIGNING

WHO KNOW THE APPLICANT MUST SIGN BELOW, GIVING THEIR FULL ADDRESSES.

SIGNATURE OF WITNESS	SIGNATURE OF WITNESS
NUMBER AND STREET ADDRESS	NUMBER AND STREET ADDRESS
CITY, STATE AND ZIP CODE	CITY, STATE AND ZIP CODE

[LOGO]
DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to: 546-66-9538

Office of Hearings and Appeals
1102 Lincoln Street, Room 200
Eugene, OR 97401
Telephone: (503) 465-6402
Date: Apr. 18, 1994

NOTICE OF DECISION - UNFAVORABLE

Sandra K. Forney
61354 Blakley, Apt A1
Bend, OR 97702

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your

request right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review within **60 days** from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider with your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide whether to review a case and in reviewing a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404, Subpart J.

If you file an appeal, the Council will consider all of my decision, even the parts with which you may agree. The Council will review your case if one of the reasons for

review listed in our regulation exists. Section 404.970 of the regulations lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council Can Review The Decision On Its Own Motion

The Appeals Council can review my decision even if you do not ask it to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal And No Review On The Appeals Council's Own Motion

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and

you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. My decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days.

Do You Have Any Questions?

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (503) 388-6712. Its address is Branch Office, 39 Louisiana Ave., Bend, OR. 97709.

Stephen P. Kramer
Administrative Law Judge

Enclosures

cc:
Philip H. Garrow
Attorney at Law
888 NW Hill Street
Bend, OR 97701

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	**CLAIM FOR**
Sandra K. Forney (Claimant)	Period of Disability and Disability Insurance Benefits
_____ (Wage Earner)	546-66-9538 (Social Security Number)

This case is before me on an order from the Appeals Council, remanding the case for further proceedings, including a new hearing. The claimant's application for disability insurance benefits was filed on November 18, 1991. She alleged that she had been disabled since June 7, 1991, due to fibrositis. Following proper notice, a hearing was held on January 13, 1993, in Bend, Oregon, after which I issued a decision denying entitlement to benefits. The claimant, who was unrepresented at the first hearing, has now obtained counsel, Philip H. Garrow, Attorney at Law.

A supplemental hearing was held on March 15, 1994, in Bend, Oregon, at which the claimant appeared personally and testified. She was represented by her attorney. Leon Forney, the claimant's husband, testified on her behalf. Peter G. Moulton, Ph.D., testified as a medical expert. Richard C. Ridenour testified as a vocational expert.

In deciding whether or not the claimant is disabled, I must follow a step-by-step evaluation process set forth in

the regulations at 20 CFR 404.1520 and 416.920. The first step of this process asks whether or not the claimant has engaged in substantial gainful work activity since the alleged onset date of disability. The claimant has continued to be unemployed since her first hearing. Prior to that time, as noted in the previous decision, she worked as a kitchen manager, baker and cook from September 4, 1991 to October 2, 1991 and earned approximately $1600 (Exhibit 10). Under the regulation at 20 CFR 404.1574(b), I find that the claimant's work activity was an unsuccessful work attempt and not substantial gainful activity. The claimant met the insured status requirements of the Social Security Act on June 7, 1991, her alleged onset date, and she will continue to meet those requirements through December 31, 1995.

The second step in the evaluation process asks whether or not the claimant has a "severe" impairment within the meaning of the Social Security Act. An impairment is considered to be "severe" if it imposes more than a minimal restriction on an individual's capacity to perform work related activity (20 CFR 404.1521 and 416.921).

In December 1991, the claimant alleged that she was forced to stop working because of continuous pain. However, she stated that she did laundry once a week, cleaned the bathroom once a week, did the dishes once a day, made the bed once a day, and swept, mopped, and vacuumed occasionally. She also did shopping for small food items and her husband helped her with shopping once a week for larger articles. She walked up to two miles a day and did water exercises.

At the supplemental hearing, the claimant testified the every day except Sunday she does water aerobics and simple stretching exercises. Also daily, she does some housework, approximately one hour, makes one trip to the store, reads, and cooks meals although she sometimes burns pots when cooking dinner. She walks five blocks three times a week to visit her parents, and her children and grandchildren come to see her two to three times a month. Walking causes burning in her muscles, but she does not have any problems with her forearms. She described fatigue which occurs between one and two p.m., and stated that she has to lie down and rest then. She said that her doctor agrees that she cannot return to work. Her medications include amitriptyline, ibuprofen, Premarin, and Flexeril, and she does not have headaches as long as she takes ibuprofen. She testified that she could not sleep prior to the introduction of amitriptyline and Flexeril, but now sleeps between 11:00 and 7:30 a.m. She said that she feels more energetic mentally, but her concentration is still poor.

The claimant's husband testified that he used to come home and find the claimant crying. He stated that she cannot drive their pickup truck and that he goes shopping with the claimant and carries groceries.

The claimant's treating physician is Steven W. Cross, M.D. As discussed in the previous decision, he has treated the claimant since 1988, although her findings were minimal at that time. On July 26, 1991, his chart notes reveal that her fibrositis and hypertension were controlled. However, on October 7, 1991, he reported that she was no longer able to work because the pain was too great for the amount of time she spent on her feet. He

continued to describe her as incapable of working as a cook or a baker through January 6, 1992, and said that she was unable to stand for more than 15 minutes at a time, walk for more than 20 minutes at a time, lift more than 15 pounds, or carry more than 15 pounds for more than 30 feet. He stated that she could "maybe" work two hours of an eight hour day. However, thereafter he reported that the claimant was walking two miles a day and doing water aerobics. She was able to sleep at night because she took Flexeril and amitriptyline. A sedimentation rate, ANA test, and a rheumatoid factor rate were all negative. On August 14, 1992, Dr. Cross' diagnosis was fibrositis, presently controlled, and he indicated that he would only need to see the claimant every three months (Exhibits 15, 19 and 21).

Additional evidence submitted by the claimant reveals that she saw Paul H. Altrocchi, M.D., for complaints of headaches, neck pain and back aches in 1985, and was prescribed short-term bed rest and Robaxin (Exhibit 31). The claimant's disability retirement was approved by the Oregon Public Employees Retirement System on February 24, 1992 (Exhibit 33).

On May 4, 1992, the claimant saw James W. Greenough, Ph.D., for a psychological assessment at the request of Disability Determination Services. She gave the impression of at least average intellectual potential, with some loss of memory and concentration abilities secondary to her preoccupation with pain. She described her mood as somewhat depressed, but less so since she has been taking antidepressant medication over the last year. The diagnoses were adjustment disorder with depression and

characteristics of a dependent personality disorder (Exhibit 16).

In September 1992, the claimant saw Terry L. Schrader, M.D., for a psychiatric evaluation, at which she reported that she had been unable to continue working as a cook/manager since October 1991. She described herself as initially in a state of denial and stated that she experienced a certain amount of depression, but was now following an active schedule pursuant to her doctor's orders. She found walking up to two miles a day, water exercise, and a jacuzzi tub to be the most helpful. She took a lot of time to do her housework, but she got it done. She slept between midnight and seven or eight a.m., and usually rested during the day. Her medications included amitriptyline, Flexeril, ibuprofen, Premarin, and an anti-hypertensive medication, and she described them as helpful, although the amitriptyline caused mild side effects such as a dry mouth. Dr. Schrader found her MMPI profile to be valid, with no evidence of a tendency to exaggerate her symptoms, and consistent with a mild depression and her diagnosis of fibrositis. The claimant believed that her pain management was better than it was a year ago, although she still had pain complaints. She stated that pain "no longer controlled her life" (Exhibit 32).

On December 6, 1993, the claimant saw Nancy L. Brennan, D.O., for a physical examination at the request of Disability Determination Services. The claimant described her two major complaints as generalized muscular pain and muscular weakness. On physical examination, Dr. Brennan noted slow gait, but no foot drop or antalgic gait, and she was able to balance herself on one

foot. She had a significant number of tender points, consistent with fibromyalgia. She had reduced range of motion of her shoulder and gross tremor of the tested extremity with exertion. Her cervical range of motion was normal; however, when she flexed her lumbar spine greater than 90 degrees, she did not have the muscle strength to pull her trunk erect and used her hands to "walk" up her thighs. Her quadriceps were unable to raise her body from a squatting position; she had difficulty rising from a low seated position; and she was unable to perform this maneuver repetitiously. Dr. Brennan opined that the claimant would be unable to sit, stand, or walk for any appreciable length of time without shifting or weight or moving about to a new position. She was sure that she would be unable to lift, carry, reach over her head, or handle objects heavier than a pound or two for any length of time. She also exhibited a lapse of concentration and some lapses in her memory (Exhibit 34, pages 1-4).

However, on a medical assessment of the claimant's ability to do work-related activities, Dr. Brennan stated that the claimant could occasionally lift 10-15 pounds, could stand/walk for a total of two to three hours in an eight hour day, 15 minutes at one time, and could sit for a total of six hours in an eight hour day, 45 minutes at one time. However, she noted that the limitations on sitting were by patient-given history, and there was no evidence of limitation on examination. She thought the claimant could occasionally climb and stoop, but never kneel, balance, crouch or crawl. She said that reaching and pushing and pulling would aggravate the claimant's trigger points. She noted that the claimant should not be around

temperature extremes or noisy environments, because external stress to the system often causes exacerbation of fibromyalgia symptoms (Exhibit 34).

Dr. Cross' chart notes reveal that he saw the claimant in March 1993 for a follow up on her blood pressure, which needed medication adjustment, and in April 1993, for a follow up on her fibrositis. In April she reported that she was feeling better on Daypro, and having less burning in her stomach. In July 1993 she revealed that she was walking two miles a day, doing water aerobics, and taking her medication. She did some housework, usually dishes, and occasionally had a day where she could clean the whole house, but then would suffer for it the next day. She was maintaining a good attitude and Dr. Cross described her fibromyalgia as chronic and stable. On October 27, 1993, Dr. Cross reported that she was still exercising, and on February 1, 1994 he stated that she was doing six days a week of water aerobics and staying active. She said that she did not want to end up like other people with the problem in wheelchairs and walking aids. At the last notation, her medications included ibuprofen, amitriptyline, Premarin, and calcium (Exhibit 37).

On February 9, 1994, the claimant received a physical capacity evaluation from Physical Therapy Associates. The claimant described morning stiffness and symptoms primarily aggravated by prolonged static posture or bending and lifting activity. Her current daily activities included minimal housework with delayed soreness, water aerobics class, and walking up to two miles per day. The claimant demonstrated significant deconditioning in her extremities and trunk for repetitive bending,

sustained stand/walk, and repetitive materials handling tolerance. The evaluator thought that the claimant was limited to part-time sedentary work; however, of the three factors considered, only one involved consideration of her "poor to fair" pain management. The other two were her deconditioning and her length of time off of work (Exhibit 38). The claimant's deconditioning for repetitive materials handling, the only portion applicable to sedentary work, was based upon her performance on timed tests which are subject to equivocal exertional efforts and possibly distorted results. Additionally, deconditioning may be related to the time lapsed since active employment. Although considered a factor for certain portions of disability assessment, such as the transferability of acquired work skills from jobs which were performed over 15 years in the past, the relatively short period of time the claimant has been unemployed would not be a factor in her evaluation for Social Security purposes. Therefore, although the claimant's limitation to sedentary or limited light work has been established and confirmed by observation and is not unusual for her diagnosis, her limitation to part-time work found by this evaluation is considered to be based upon subjective factors within the control of the individual. As will be further discussed below, I find that the claimant is prone to exaggeration of her restrictions and subjective symptomatology, and that therefore a limitation of part-time work is not reasonable under the circumstances and not supported by the other evidence of record.

At the hearing, Peter Moulton, Ph.D., testified as a medical expert. He stated that the claimant's diagnoses are fibrositis and mild dysthymia, which has been helped by

medication. He thought that she had moderate limitations on her activities of daily living and slight difficulties in maintaining social functioning, but that she often had deficiencies of concentration, persistence, or pace. He said that she was moderately limited in her ability to understand, remember and carry out detailed instructions, her ability to maintain attention and concentration for extended periods, and in her ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. He did not think that she was significantly limited in any other categories.

Upon consideration of the evidence in its entirety, I find that the record establishes a combination of severe impairments that impose more than a minimal limitation on the claimant's ability to perform basic work activities (Exhibit 25 and 20 CFR 404.1520(c), 404.1520a(c) and 404.1521). However, these impairments do not meet or equal any of the criteria of the Listing of Impairments contained in Appendix 1, Subpart P, Regulations No. 4.

The claimant's fibrositis has been evaluated under the Listings at 1.00 *et seq.* for the musculoskeletal system. Other than complaints of pain, the claimant does not have the appropriate abnormal signs or laboratory findings required to satisfy the requirements of any Listing under this section. The claimant's mental sypmtomatology does not meet or equal the requirements of any of the impairments for mental disorders, as documented in the evidence of record and confirmed by Dr. Moulton's testimony. A psychological review technique form has been prepared reflecting this determination and is attached to this decision. As disability is not established pursuant to

the criteria of 20 CFR 416.920(d), further evaluation in this claim requires an assessment of the claimant's residual functional capacity.

In assessing the claimant's residual functional capacity, consideration has been given to the claimant's testimony regarding pain and discomfort. Pain, when associated with a medically determinable impairment which could produce pain, may be of such severity as to cause an individual to be under a "disability." However, the inability of a claimant to work without some pain and discomfort does not necessarily satisfy the test for disability under the provisions of the Act. *Kroeneke v. Richardson*, 363 F.Supp. 891 (D.Or.1973); *Valdez v. Heckler*, 616 F.Supp. 933, 940 (D.C.Cal.1985).

As noted in Social Security Ruling 88-13, the related "symptoms" of pain are the individual's own perception of the effects of the physical or mental impairment. Because of the subjective characteristics of symptoms and the absence of reliable techniques for measurement, symptoms (especially pain) are difficult to prove, disprove or quantify. This ruling notes a need for a sound medical basis for the disability decision as well as consideration of the claimant's symptoms. The ruling, which is binding upon an Administrative Law Judge in the consideration of symptoms (including pain) in the evaluation of disability cases (20 CFR § 422.406(b)(1)), reiterates the policy set forth in the Social Security Regulations (20 CFR § 404.1529 and § 416.929), which provide that pain cannot be found to have a significant effect on a disability decision unless medical signs or laboratory findings show

that a medically determinable physical or mental impairment is present that reasonably could be expected to produce the pain alleged.

In determining the level and severity of pain, pertinent evidence has been considered such as: descriptions of the claimant's daily activities; frequency, amounts and effects of any medications; the claimant's appearance and credibility; any comments of physicians appearing of record; objective clinical laboratory findings, or the lack thereof; and the existence or nonexistence of any observable signs or significant pathological abnormalities associated with and resulting from severe and intense pain. If it is found that a claimant's testimony relating to the intensity of his or her pain and other limitations is unreliable, a credibility determination is to be made citing the reasons why the testimony is unpersuasive. *Bunnell v. Sullivan*, 947 F.2d 341 (9th Cir. 1991). In this regard, questions of credibility and resolutions of conflicts in the testimony are functions solely of the Secretary. *Yuckert v. Bowen*, 841 F.2d 303, 307 (9th Cir.1988); *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.1982); *Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir.1971).

In accordance with the criteria set forth above, the record fails to document incapacitating symptomatology to the extent and degree alleged by the claimant. The record reflects significant discrepancies and/or omissions between the claimant's reports to various medical personnel and to the Agency. She alleges severe, incapacitating pain in one instance, and then, on another, states that her condition has undergone significant improvement with treatment and medication. She told Dr. Schrader that her

pain management was better than it was a year previously, and that pain no longer controlled her life, a statement which is substantially reproduced in her reports to Dr. Cross, and yet she told Dr. Brennan that her generalized muscular pain was a "10" on a scale of 1 to 10. In the latter instance, she was aware that she was undergoing a physical examination with emphasis on evidence of fibrositis and its severity.

While it is essentially uncontroverted that the claimant is incapable of returning to work as a managerial cook, work which she described as involved standing up to seven hours a day and frequently lifting up to 50 pounds (Exhibit 9), despite her allegations, the record does not establish the legitimacy of her other complaints. Even after considering her assertions of extreme pain, Dr. Brennan found that she was capable of sitting for up to six hours a day, walking or standing up to three hours a day, and occasionally lifting 10 to 15 pounds. The physical capacities evaluation likewise found that she was capable of sedentary work, and, although a further reduction to part-time work was noted, that reduction was based upon tests which are capable of distortion based upon equivocal effort, as previously discussed.

The claimant's activities are commensurate with a capacity for sedentary work, and even occasional light work. Another example of her somewhat misleading testimony is that she failed to mention at the hearing that she can occasionally clean her whole house in one day. Her list of daily activities is quite broad, and while it is noted that she does not drive, apparently the only vehicle available is a pick-up truck. She does housework, exercises, cooks, reads, and goes shopping daily. She does more extensive

activities several times a week. The record does not support a conclusion that she must lie down for a protracted period every day, and Dr. Brennan did not note such a significant disruption in her ability to perform activities during the day. Therefore, I conclude that this resting period is not medically imperative.

I do not find the claimant's testimonial reports of subjective reporting of her capacity to be the most reliable evidence of record upon which to base an assessment of her residual functional capacity. The only physician to currently render a physical capacities evaluation is Dr. Brennan, and her assessment indicates that the claimant is capable of working. Dr. Cross has not recently expressed an opinion, and subsequent to his statement that the claimant might be limited to two hours per day (with apparent reference to her work as a cook), he has repeatedly reported that her condition has improved or stabilized. Even the claimant herself acknowledges that she is capable of more activity than that encompassed by two hours per day. In fact, she does at least two hours of work per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. Although the claimant stated that her doctor supports her contention that she cannot return to work, it is conceded that she cannot return to work *as a baker or a cook*. Other work is not precluded by a statement that she could not return to work she had been doing in the past.

The claimant's demeanor at the hearing was not indicative of an individual who is experiencing disabling incapacity; she did not appear to be in pain or require a period in which to rest. She was capable of attention to all questions asked, and her responses were rational,

although somewhat evasive. Her medications are very conservative, but even this conservative treatment has produced considerable relief of her symptoms. For example, she no longer has difficulty sleeping regularly, she no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony. Upon consideration of the evidence in its entirety, I find that the subjective reports of the claimant and her witness are not credibly supported by the weight of the evidentiary record to the extent alleged pursuant to the criteria of SSR 88-13.

I find that the claimant is capable of sedentary or light work within the ranges described below; however, based upon the testimony of the vocational expert at the hearing, and as previously discussed above, this precludes the performance of her past relevant work. If the claimant cannot return to her past relevant work, then the Secretary must assume the burden of showing that despite her impairments and in light of her age, education and work experience, there is still other work she can perform, which exists in significant numbers in either the claimant's regional economy or in the national economy or both.

At the hearing, Richard Ridenour testified as a vocational expert. Although he stated that the claimant could not perform her past relevant work as a head cook, a baker, or manager of a school lunch room program if she were limited to the sedentary or light exertional level, he testified that the claimant has acquired skills from that work which are transferable to other semi-skilled work. He identified these skills as involving public contact and

service to the public. The claimant is 47 years old and has the equivalent of a high school education. She was 44 years old at her alleged onset date. Given a hypothetical question limiting the claimant to work that does not involve lifting more than 15 to 20 pounds or walking more than two miles, and which allows her the ability to stand and change position at will, and also considering her vocational factors, Mr. Ridenour testified that the claimant could perform work as an order clerk and a telephone answering service operator. Given an additional hypothetical question limiting the claimant in accordance with the functional capacity assessment described by Dr. Brennan and further considering the limitations described by Dr. Moulton at the hearing, in addition to her vocational factors, Mr. Ridenour testified that she could still perform the jobs in question. Finally, given a hypothetical question based upon the physical capacity evaluation performed by Physical Therapy Associates, found in Exhibit 38, in addition to the same psychological limitations and vocational factors, Mr. Ridenour's testimony remained unchanged. As I have determined that the claimant can perform sedentary work as described on a full-time basis, she would be able to perform the jobs of order clerk and answering service operator full-time. Mr. Ridenour testified that there are over 850,000 such jobs in the national economy.

In summary, I find that the jobs delineated by the vocational expert support a conclusion that the claimant has had the ability to perform a wide range of sedentary work existing in significant numbers in the national economy during the period relevant to this adjudication. Therefore, the framework of Rules 201.21 and 201.22 of

Appendix 2, Subpart P, Regulations No. 4 directs a conclusion that she is not under a disability. Accordingly, I find that the claimant is "not disabled," as defined by the Social Security Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on June 7, 1991, the date the claimant stated she became unable to work, and will continue to meet them through at least December 31, 1995.

2. The claimant has not engaged in substantial gainful activity since June 7, 1991.

3. The medical evidence establishes that the claimant has a combination of severe impairments, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's testimony, and that of her husband, was not fully credible.

5. The claimant has the residual functional capacity to perform work as described in the decision above (20 CFR 404.1545).

6. The claimant is unable to perform her past relevant work as a head cook, a baker, and a manager of a school lunch room program.

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the limitations described in the decision above.

8. The claimant is 47 years old, which is defined as a younger individual (20 CFR 404.1563).

9. The claimant has the equivalent of a high school education (20 CFR 404.1564).

10. Considering the claimant's younger age, transferability of skills is not a material factor in the determination of disability; however, the claimant has acquired work skills which are transferable to other semi-skilled work, such as working with and serving the public.

11. Based on an extertional capacity for sedentary work, and the claimant's age, education, and work experience, section 404.1569 and Rules 201.21 and 201.22, Table No. 1, Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of "not disabled."

12. Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary work, at the hearing a vocational expert testified that there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: food and beverage order clerk and telephone answering service operator. There are over 850,000 such jobs in the national economy.

13. The claimant was not under a "disability," as defined in the Social Security Act, at any time

through the date of this decision (20 CFR 404.1520(f)).

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on November 18, 1991, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/ Stephen P. Kramer
STEPHEN P. KRAMER
Administrative Law Judge

Apr. 18, 1994
Date

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

Name: Sandra K. Forney SSN: 546-66-9538

Assessment is for: Current Evaluation

Administrative Law Judge's Signature	Date
/s/ Illegible	APR 18 1994

I. MEDICAL SUMMARY

A. Medical Disposition(s): Impairment Severe But Not Expected to Last 12 Months

B. Based Upon Category(ies): 12.04

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or sympton CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[x]	A.	12.02	Organic Mental Disorders
[ ]	[x]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	C.	12.04	Affective Disorders
[ ]	[x]	D.	12.05	Mental Retardation and Autism
[ ]	[x]	E.	12.06	Anxiety Related Disorders

[ ]	[x]	F.	12.07	Somatoform Disorders
[ ]	[x]	G.	12.08	Personality Disorders
[ ]	[x]	H.	12.09	Substance Addiction Disorders

C. **12.04 Affective Disorders** – Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT–ABSENT–INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Depressive syndrome characterized by at least four of the following:
   - a. [ ] Anhedonia or pervasive loss of interest in almost all activities, or
   - b. [ ] Appetite disturbance with change in weight, or
   - c. [ ] Sleep disturbance, or
   - d. [ ] Psychomotor agitation or retardation, or
   - e. [ ] Decreased energy, or
   - f. [ ] Feelings of guilt or worthlessness, or
   - g. [ ] Difficulty concentrating or thinking, or
   - h. [ ] Thoughts of suicide, or
   - i. [ ] Hallucinations, delusions or paranoid thinking

2. [ ] [x] [ ] Manic syndrome characterized by at least three of the following:
   - a. [ ] Hyperactivity, or
   - b. [ ] Pressures of speech, or
   - c. [ ] Flight of ideas, or
   - d. [ ] Inflated self-esteem, or
   - e. [ ] Decreased need for sleep, or
   - f. [ ] Easy distractibility, or
   - g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or
   - h. [ ] Hallucinations, delusions or paranoid thinking
3. [ ] [x] [ ] Bipolar syndrome with a history of episodic periods

manifested by the full symptomatice picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)

4. [x] [ ] [ ] Other: Dysthymia-mild

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" Criteria of the Listings

The following functional limitations (which apply to paragraph B of listings 12.02-12.04 and 12.06-12.08 and paragraph D of 12.05) exist as a result of the individual's mental disorder(s).

NOTE: Items 3 and 4 below are more than measures of frequency. Duration and effects of the deficiencies (item 3) or episodes (item 4) are discussed in the decision.

Listing(s) under which the items below are being rated: 12.04

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

---

1. Restrictions of Activities of Daily Living:

None[ ] Slight[ ] Moderate[x] Marked*[ ]
Extreme[ ] Insuff Evid[ ]

---

2. Difficulties in Maintaining Social Functioning:

None[ ] Slight[x] Moderate[ ]
Marked*[ ] Extreme[ ] Insuff Evid[ ]

---

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never[ ] Seldom[ ] Often[x] Frequent*[ ]
Constant[ ] Insuff Evid[ ]

---

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptons (which may Include Deterioration of Adaptive Behaviors):

Never[ ] Once/Twice[ ] Repeated*(3+)[ ]
Continual[ ] Insuff Evid[ ]

---

*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [0] (The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04, and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

RALPH WILBORN & ETTA L. WILBORN, P.C.
RALPH WILBORN, ATTORNEY AT LAW
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
OSB #84104
(503) 485-4265
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY SSN: 546-66-9538 Plaintiff, vs. DONNA E. SHALALA, Secretary of Health & Human Services, Defendant.	CASE NO. 94-6357-J0 COMPLAINT TO REVIEW AND SET ASIDE THE FINAL ORDER OF THE SECRETARY PURSUANT TO 42 U.S.C.A. § 405(g).

The above-named plaintiff makes the following representations to this court for the purpose of obtaining judicial review of a final decision of the Secretary adverse to Plaintiff:

I

This is an action to review the final order of the Secretary of Health and Human Services, of which this

Court has jurisdiction pursuant to 42 U.S.C.A. §405(g), as amended.

II

Plaintiff is a U.S. citizen, a resident Bend, County of Deschutes, in the Judicial District of this Court.

III

On or about November 18, 1991, Plaintiff duly filed an application with the Social Security Administration for disability insurance benefits under 42 U.S.C.A. §§ 423(a) and 416(i) (1974) of the Social Security Act.

IV

Said application was denied and denied again after reconsideration. Plaintiff timely filed a request for hearing.

V

On April 18, 1994, after a hearing held before him, Stephen P. Kramer, administrative law judge for the Social Security Administration, denied Plaintiff's claim on the grounds that Plaintiff was not disabled as defined by the provisions of the Social Security Act, as amended, at the time of adjudication.

VI

Plaintiff timely appealed the ALJ's decision. By Order of the Appeals Council dated July 30, 1993, the Appeals Council of the Social Security Administration remanded Plaintiff's Social Security case for further proceedings, including a new hearing.

VII

On April 27, 1993, after a hearing held before him, Stephen P. Kramer, administrative law judge for the Social Security Administration, denied Plaintiff's claim again on the grounds that Plaintiff was not disabled as defined by the provisions of the Social Security Act, as amended, at the time of adjudication.

VIII

Plaintiff timely appealed the ALJ's decision. By Action of the Appeals Council dated July 28, 1994, the Appeals Council of the Social Security Administration denied Plaintiff's Request for Review, thereby sustaining the decision of the administrative law judge. This resulted in the ALJ's decision becoming the final order of the Secretary from which Plaintiff now appeals to this Court.

IX

Plaintiff was under a disability commencing on or before June 7, 1991, and is presently under such disability which entitles her to benefits under the Social Security Act.

X

Pursuant to 42 U.S.C.A. §405(g), Plaintiff files this action requesting the Court to reverse said decision, or, in the alternative, to remand this cause for proper evaluation of the evidence or a rehearing *de novo* on the following grounds:

1. The decision of the Secretary is without foundation, not supported by substantial evidence, and is, in fact, contrary to the evidence presented.

2. The Secretary erred in his failure to apply the appropriate standard of law.

XI

The decision and actions of the Secretary are not substantially justified within the meaning of the Equal Access to Justice Act, 28 U.S.C.A. §2412(b)(d).

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. That this court reverse and set aside the decision of Defendant denying Plaintiff's claim for disability benefits;

2. In the alternative, that this court remand the case back to the Secretary for proper evaluation of the evidence or a hearing *de novo*;

3. For costs of suit incurred herein and attorneys' fees;

4. For such other relief as the court deems just and proper.

DATED THIS 12th day of September, 1994.

/s/ Ralph Wilborn
RALPH WILBORN,
OSB #84104
OF ATTORNEYS FOR
PLAINTIFF

KRISTINE OLSON ROGERS, OSB #73254
United States Attorney
District of Oregon
CRAIG J. CASEY, OSB #68026
Assistant United States Attorney
888 S.W. Fifth Avenue
Suite 1000
Portland, OR 97204-2024
(503) 727-1028

RICHARD H. WETMORE
Special Assistant United States Attorney
Department of Health and Human Services
2201 Sixth Avenue, M/S RX-10
Seattle, WA 98121
(206) 615-2268
Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff, V. DONNA E. SHALALA, Secretary of Health and Human Services, Defendant.	Civil No. 94-6357-JO ANSWER

Defendant, for Answer to plaintiff's Complaint, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs I through VIII.

II.

Denies the allegations contained in Paragraphs IX and XI.

III.

With respect to Paragraph X, the defendant states that these constitute a Prayer for Relief to which no response is deemed necessary. However, if the court requires a response, the defendant denies that the plaintiff is entitled to judgment or the relief sought.

IV.

With respect to the plaintiff's request that this case be remanded by the Court to the defendant, the defendant states that the plaintiff has not shown "good cause" pursuant to § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), to warrant remand.

V.

With respect to the plaintiff's request for costs, the defendant states there are no provisions in the Social Security Act to permit costs to be charged against the defendant. However, costs charged against the United States can be paid from general revenues by the General Accounting Office, if so ordered by the Court.

VI.

With respect to the plaintiff's request that attorney's fees be awarded by the Court, the defendant states that this Court, pursuant to § 206(b) of the Act, 42 U.S.C. § 406(b), may award a reasonable fee, under Title II only, not in excess of twenty-five percent (25%) of total past-due benefits, such fee to be paid from such past-due benefits, where the Court renders a judgment favorable to the plaintiff.

VII.

With respect to the plaintiff's request for attorney's fees under the Equal Access to Justice Act, should the plaintiff prevail and file an application for fees against the United States in accordance with 28 U.S.C. § 2412, enacted as part of the Equal Access to Justice Act, the defendant reserves the right to oppose any award under this statute.

VIII.

Defendant denies each and every allegation of the Complaint not otherwise specifically admitted, denied or qualified.

IX.

The findings of fact of the Secretary of Heath and Human Services are supported by substantial evidence and are conclusive.

X.

In accordance with § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), the defendant files as part of the Answer a certified copy of the transcript of the record, including the evidence upon which the findings and decisions complained of are based.

WHEREFORE, the defendant prays for a judgment dismissing the Complaint, with costs and disbursements, and for a judgment in accordance with § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), affirming the agency decision.

DATED this 23 day of November, 1994.

Respectfully submitted,

KRISTINE OLSON ROGERS
United States Attorney
District of Oregon

/s/ Craig J. Casey
CRAIG J. CASEY
Assistant United States
Attorney

RALPH WILBORN, ATTORNEY AT LAW
Ralph Wilborn & Etta L. Wilborn, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
OSB # 84104
(503) 485-4265
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff,	CIVIL ACTION NO. 94-6357-JO
vs.	PLAINTIFF'S MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW
DONNA E. SHALALA, Secretary of Health & Human Services, Defendant.	

TABLE OF CONTENTS

STATEMENTS OF THE CASE..... 1
PROCEDURAL BACKGROUND..... 1
STATEMENT OF THE FACTS..... 2
THE DOCUMENTARY AND MEDICAL RECORD.. 2
Plaintiff's Mental Impairment..... 2
Plaintiff's Physical Impairment..... 3
HEARING TESTIMONY 10
Plaintiff's Testimony At Her First Hearing 10
Plaintiff's Testimony At Her Second Hearing... 11

Lay Witness Testimony 15
Medical Expert Testimony 16
Vocational Expert Testimony 17
THE ALJ'S DECISION 17
ARGUMENT & LEGAL ISSUE 18
Reviewability and Standard of Review 18
Disability and The Sequential Evaluation 19
The ALJ Failed To Reject Treating Physician Cross' Opinion By Correct Legal Standards 20
The ALJ Failed To Reject Lay Testimony By Correct Legal Standards 23
STEP FIVE OF THE SEQUENTIAL ANALYSIS ... 28
The Vocational Expert Testimony Is Inaccurate, Directly Contradicting Information Contained In The DOT and SCO 30
CONCLUSION 33
CERTIFICATE OF SERVICE BY MAIL 34

TABLE OF CASES

Page

Bonilla v. Secretary HEW, 671 F.2d 1245 (9th Cir. 1982) 28
Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986) 23
Day v. Weinberger, 522 F.2d 599 (9th Cir. 1984) 20
Dodrill v. Shalala, 12 F.3d 915 (9th Cir. 1993) 23, 28
Embrey v. Bowen, 849 F.2d 418 (9th Cir. 1988) 21

Gallant v. Heckler, 753 F.2d 1450 (9th Cir. 1984) ...26, 29
Gamer v. Secretary of HHS, 815 F.2d 1275 (9th Cir. 1987) 23
Hammock v. Bowen, 879 F.2d 498 (9th Cir. 1987) 23
Jones v. Heckler, 760 F.2d 993 (9th Cir. 1985) 19, 26
Lewis v. Weinberger, 541 F.2d 417, 421 (4th Cir. 1976) 26
Martinez v. Heckler, 807 F.2d 771 (9th Cir. 1986) 18
Montijo v. Secretary HHS, 729 F.2d 599 (9th Cir. 1984) 20, 26
Murray v. Heckler, 722 F.2d 499 (9th Cir. 1983) 20
Perminter v. Heckler, 765 F.2d 870 (9th Cir. 1985) 26
Rhodes v. Schweiker, 660 F.2d 722 (9th Cir. 1981) 20
Richardson v. Perales, 402 U.S. 389 (1971) 18, 19
Sorenson v. Weinberger, 514 F.2d 1112 (9th Cir. 1975) 18
Sprague v. Bowen, 812 F.2d 1226 (9th Cir. 1987) 28
Terry v. Sullivan, 903 F.2d 1273 (9th Cir. 1990) 30, 31
Varney v. Secretary of HHS, 859 F.2d 1396 (9th Cir. 1988) (*Varney II*) 27
Villa v. Heckler, 797 F.2d 794 (9th Cir. 1986) 30
Winans v. Bowen, 853 F.2d 643 (9th Cir. 1987) 20

TABLE OF REGULATIONS AND STATUTES

Page

20 C.F.R. § 404.1566(d)(1) 30
20 C.F.R. § 404.1520(b)-(f) 19
20 C.F.R. § 416.966(d)(1) 30

42 U.S.C. § 405(g) 1, 18

42 U.S.C. § 423 .....1, 2

42 U.S.C. § 423(d)(1)(A) 19

42 U.S.C. § 423(d)(2)(A) 19

42 U.S.C. § 423(a)(1)(D) 19

RALPH WILBORN, ATTORNEY AT LAW
Ralph Wilborn and Etta L. Wilborn, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
OSB #84104
(503) 485-4265
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff, vs. DONNA E. SHALALA, Secretary of Health & Human Services, Defendant.	CIVIL ACTION NO. 94-6357-JO PLAINTIFF'S MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

STATEMENT OF THE CASE

This action is brought pursuant to § 205(g) of the Social Security Act, (42 U.S.C. § 405(g)), to obtain judicial review of the final decision of the Secretary of Health & Human Services denying Plaintiff's claim for disability

insurance benefits pursuant to § 223 (42 U.S.C. § 423) of the Social Security Act.

PROCEDURAL BACKGROUND

On November 18, 1991, Plaintiff filed for disability insurance benefits under Title II of the Social Security Act. (Tr. 96-99). This application was denied initially and upon reconsideration. (Tr. 110-11 and 125-26). Plaintiff requested a hearing (Tr. 127-28). After holding a hearing, on April 27, 1993, Administrative Law Judge (ALJ) Stephen P. Kramer, issued a decision denying Plaintiff's application. (Tr. 211-23). Plaintiff requested review by the Appeals Council (Tr. 224-25) and on July 30, 1993, by Order of Appeals Council Remanding Case To Administrative Law Judge, the Appeals Council granted the request for review and remanded Plaintiff's claim for further administrative proceedings. (Tr. 231-32).

Following another hearing, by decision dated April 18, 1994, ALJ Kramer once again issued a decision denying Plaintiff's claim. (Tr. 10-28). Plaintiff again requested review of the ALJ's decision by the Appeals Council (Tr. 8-9). However, the Appeals Council declined to grant the request for review. (Tr. 5-6). This action resulted in the ALJ's April 18, 1994, decision becoming the final order of the Secretary from which Plaintiff seeks judicial review.

STATEMENT OF THE FACTS

Born August 1, 1946, (Tr. 96) Plaintiff was 47 years old when the ALJ issued his decision. Plaintiff alleges disability beginning June 7, 1991, based on Fibromyalgia

and depression. She completed the 10th grade of high school and obtained her GED in 1977. (Tr. 139 and 263). Her past work was identified at her first hearing by the vocational expert as a composite of the following occupations: 1) Head Cook, School Cafeteria, DOT #313.131-018, a skilled, medium level job; 2) Baker, DOT #526.381-010, a skilled, heavy level job; and 3) Manager, School Lunch Room, DOT #187.167-026, a skilled, light level job. (Tr. 276).

THE DOCUMENTARY AND MEDICAL RECORD

Plaintiff's Mental Impairment:

Plaintiff's primary impairment is based on pain and other discomforts associated with fibromyalgia. Additionally, as the result of limitations placed upon her ability to engage in a normal lifestyle, Plaintiff has developed an adjustment disorder with depressed mood. The medical advisor called by the ALJ at Plaintiff's second hearing opined that this mental impairment resulted in *moderate* restrictions in Plaintiff's mental residual functional capacity as set out on the form at Tr. 293-95. Because the ALJ adopted Dr. Moulton's opinions, and because Plaintiff does not contest Dr. Moulton's opinions, no summary of Plaintiff's psychological record is necessary.

Plaintiff's Physical Impairment:

Plaintiff's primary disability is based on fibromyalgia, a term which is used interchangeably throughout the instant record with the term "fibrositis." In her report of December 6, 1993, Nancy Brennan, D.O., described the disease as follows:

> The Premier on Rheumatic Diseases, 9th Edition, published by the Arthritis Foundation, "reports that the hallmark of the examination of a fibrositis patient is the lack of objective findings, in relationship to the plethora of symptoms." (Page 228). The diagnosis tends to be one of exclusion of other rheumatologic conditions. With her past history of negative rheumatologic serology, and her below outlined physical examination, fibra myalgia (sic) syndrome is the most reasonable diagnosis of her symptoms.

(Tr. 252).

Plaintiff's fibromyalgia began several years before it disabled her from working. In May, 1992, she reported to Dr. Greenough that her muscle pain became more severe in the latter part of 1987, and that it was originally diagnosed as rheumatoid arthritis, but medications normally used to treat that disorder did not help. (Tr. 166).

Plaintiff's treating physician is Steven W. Cross, M.D. In August, 1988, Plaintiff saw Dr. Cross with the "complaint of morning stiffness, lots of aches and pains." (Tr. 173). At that time, he assessed probably fibrositis and started her on Flexeril and Lasix. By the end of the month, Plaintiff reported feeling much better. (Tr. 173). A year later, in August, 1989, Dr. Cross noted she was doing much better; that she had stopped the Lasix because it seemed to have the opposite of the intended effect, causing swelling and water retention; and that she was continuing to take the Flexeril. (Tr. 173).

On February 5, 1990, Plaintiff consulted Dr. Cross with complaints of not feeling right, being headachey, and being unable to concentrate. He started her on

Hydrochlorothaizide and Ibuprofen. By February 26, 1990, Plaintiff reported feeling tired all the time, dropping things at work, and not getting any relief for even a few hours per day as she usually did. Dr. Cross noted Plaintiff had pressure point tenderness across her shoulder, wrists, and ankles; that her hypertension was possibly related to Ibuprofen; and that her fibrositis was not well controlled. He planned to continue Plaintiff on Hydrochlorothiazide and Flexeril, to stop the Ibuprofen, and to have her see Dr. Tretheway. (Tr. 174).

On March 9, 1990, Plaintiff reported feeling much better. Dr. Tretheway has started her on Amitriptyline which appeared to help her sleep and feel better during the day. She was walking two miles a day, with improvement in her stiffness and point tenderness. Dr. Cross' assessment was that she had marked improvement in her fibrositis. (Tr. 174).

In August, 1990, Plaintiff saw Dr. Cross for a followup of her fibrositis and an annual employment examination. She reported having a continuing problem with fibrositis but felt better emotionally. She reported sleeping well and being less stiff in the morning, with most of her problems starting "after about four hours of work." At the time, she was working as a custodian instead of as a cook. (Tr. 175).

On October 7, 1991, Plaintiff saw Dr. Cross for followup of her fibrositis. She reported being no longer able to work because the "pain is just to[o] great for the amount of time she spends on her feet." Objectively, Dr. Cross noted she still had the same findings of fibrositis, pressure point tenderness,stiff joints, and sore muscles.

He advised her to quit work at that time, and noted he would fill out her disability papers for her. (Tr. 176).

On November 8, 1991, Plaintiff reported having more aches and pains, although she was no longer working. She was trying to stay active with water aerobics and walking, but "the pain is getting somewhat more intense." She complained of pains in her arms and legs and occasional weakness. (Tr. 176).

By letter dated January 6, 1992, Dr. Cross wrote to the Secretary, stating his opinion of Plaintiff's residual functional capacity, in relevant part, as follows:

> On 10/17/91 I advised Sandra to quit work. Sandra is suffering from fibrositis requiring Flexeril and Amitriptyline and Ibuprofen to help control her discomfort. The fibrositis is such that [it] inhibits her in doing much of her work. She is unable to stand more that 15 minutes at a time. I do not want her walking more than 20 minutes at a time. I do not want her lifting more than 15 lbs. I do not want her carrying more than 15 lbs. for more than 30 feet. She could work maybe two hours out of a[n] eight hour day.

(Tr. 164).

On May 21, 1992, Plaintiff saw Dr. Cross for a physical examination. She reported having pain on a daily basis throughout the day; she reported walking two miles a day and doing water aerobics. This activity was noted to help keep her flexibility but not to alleviate her pain. Plaintiff reported being able to sleep by taking Flexeril and Amitriptyline. She reported doing her housework,

although inefficiently. Apart from her exercise, "[a]ctivities of daily life" were reported to be the extent of her activity. Dr. Cross' assessment was of chronic fibrositis. (Tr. 176). On August 14, 1992, Plaintiff's subjective reports were similar, and Dr. Cross noted she was continuing her walking and water aerobics as recommended. He assessed "Fibrositis, presently controlled," and he noted he would see her every 3 months. (Tr. 183).

In September, 1992, Plaintiff underwent a psychiatric evaluation by Terry Schrader, M.D., at the request of the Secretary. Dr. Schrader addressed Plaintiff's goals as follows:

> Patient[']s goals are to "sleep well at night", and "maintain as much function as possible". She does this by following her doctor[']s orders and maintaining an active schedule. She arises between 7-8 A.M. She finds walking, up to 2 miles a day, water exercise, and a jacuzzi tub the most helpful. She takes "alot of time" to do her housework, but she "gets it done". She dresses herself. She enjoys seeing her grandchildren. She usually rests every day. She goes to bed about midnight. Sometimes pain awakens her.

(Tr. 236).

Dr. Schrader reported that Plaintiff's MMPI profile was considered valid and "consistent with her diagnosis of Fibrositis. There is no evidence of a tendency to exaggerate her symptoms." (Tr. 237).

Dr. Schrader opined that Plaintiff's psychiatric complaints were consistent with her physical problems, and that her symptoms of depression were relatively mild and consistent with her loss of physical function. He noted

that although Plaintiff "believes that her pain management is between than it was a year ago, she still has pain complaints. She states pain "no longer controls her life". Nevertheless, Dr. Schrader believed Plaintiff might benefit from a pain management program, and he discussed it with her. (Tr. 237).

In April, 1993, Plaintiff reported that her fibrositis was more painful. On examination, Dr. Cross observed that her pressure points were more tender, and he opined that she had outlived the usefulness of her Ibuprofen treatment. Accordingly, he started her on Daypro. (Tr. 285). By the end of April, 1993, Dr. Cross noted Plaintiff was feeling better on Daypro; that she was having less burning; and that her fibrositis was improved. (Tr. 286).

On July 23, 1993, Dr. Cross performed a followup examination of Plaintiff. He noted that her "daily life consists of walking two miles a day, doing water aerobics, and taking her medication. She does do some housework, usually just dishes. Occasionally she will have a day when she can clean the whole house, but then suffers for it the next day. She however is maintaining a good attitude and is interested in maintaining her health . . . " (Tr. 286). Dr. Cross noted that the only place Plaintiff did not have pressure point tenderness is her left forearm, and his clinical impression was listed as fibromyalgia, chronic, stable. (Tr. 286).

On October 27, 1993, Dr. Cross noted that Plaintiff's Daypro was not helping as much as did the Ibuprofen, and that Plaintiff needed to increase her dosage of Amitriptyline from 25 mg. to 50 mg. Otherwise, she

appeared stable and was noted still to be exercising. (Tr. 287).

On November 22, 1993, also at the request of the Secretary, Plaintiff underwent a consultative physical examination by Nancy Brennan, D.O. Plaintiff reported two major complaints, *i.e.*, significant generalized muscular pain, and generalized muscular weakness. She rated her pain on a scale of 1 to 10, with 1 being the least pain and 10 being the greatest, as a 10. She reported having muscle pain with easy muscle fatiguability and an inability to perform consistently activities of daily living. (Tr. 251). Dr. Brennan noted that the "musculoskeletal exam is remarkable for the almost total presence of tender points, consistent with fibramyalgia (sic)." (Tr. 252). She reported her objective examination results as follows:

> . . . . She has tender points at the insertion of the nuchal muscles, and to the occiput, upper trapezial border. She has tender points across the anterior petoralis muscle, lateral to the 2nd costochondral junction. She has tender points approximately 2 cm below the outer lateral epicondyle. She has tender points along the iliac crest, along the upper gluteal area, just posterior to the greater trochanter. She also has points of the medial knee, and at the gastrocnemius achilles tendon junction. She is absent the middle of the forehead control point, but has the control point on the volar aspect of the mid forearm, and on the muscles of the anterior thigh. She has reduced range of motion of her shoulder. Arm abducts to 115 degrees, external rotation is reduced by 10 degrees, and internal rotation is reduced by 10 degrees. The muscle strength of the trapezius and deltoid and biceps

> are both approximately 4 our [sic] of 5. She does complain of significant amount of pain with muscle contraction against resistance, and develops gross tremor of the tested extremity with exertion. The tremor appears to be out of proportion with the amount of exertion applied, however, it does seem to be involuntary. Her cervical range of motion is normal. She is able to flex her neck to 45 degrees, extend to 45 degrees, side bend and rotate (R) and (L) to 45 degrees. Her lumbar spine, she flexes greater than 90 degrees, but has not the muscle strength to pull her trunk up erect. She walks up her anterior thighs with her hands. Her quadriceps are unable to raise her body weight from a squatting position. Her quadriceps and hamstrings strength is 3 out of 5. She has difficulty rising from a low seated position, and is unable to perform this repetitiously.
>
> During the Examination, except for observing muscle strength and ambulation, she sat for approximately 30 minutes. She did shift her weight from one side to the other, and appeared to be somewhat uncomfortable. She was unable to stand for an extended period of time, and she would lean against the exam table, or against the counter, to take weight off of one leg at a time.
>
> There was clearly no observed pathology, except for the above mentioned muscle weakness, and gross tremor, and there is no evidence of end organ damage from the fibramyalgia (sic).
>
> In my opinion, based on the objective medical findings, I do not feel that she would be able to sit, stand, or walk for any appreciable length of time without shifting her weight, or moving

> about to a new position. I am sure she would be unable to lift, carry, reach over her head, or handle objects that would be heavier than a pound or two for any length of time. Her hearing and speaking are unaffected, however she does demonstrate a lapse of concentration, and some lapses in her memory.

(Tr. 252-53).

In addition to her report, Dr. Brennan completed a form on which she indicated her opinion to Plaintiff's physical residual functional capacity. In relevant part, she opined Plaintiff could lift/carry a maximum of 10-15 pounds occasionally and that she could not lift/carry frequently. She could stand/walk 15 minutes at a time for a total of 2 to 3 hours per 8-hour workday. She could sit 45 minutes at a time for a total of 6 hours per 8-hour workday. She could occasionally climb and stoop, but she could never kneel, balance, crouch or crawl. Dr. Brennan also noted that repetitive pushing/pulling aggravate Plaintiff's trigger points and that reaching and pushing/pulling were affected to an unspecified degree. Finally, she opined that Plaintiff's fibromyalgia also caused environmental restrictions and that temperature extremes and noise could exacerbate it. (Tr. 255-57).

The last progress note from Dr. Cross is dated February 1, 1994. At that time, Dr. Cross saw Plaintiff for followup of her complaints related to her fibromyalgia. He noted she was doing fairly well; that she was doing water aerobics six days per week; and that she did not want to end up like other people with the problem in wheelchairs and walking aids. His clinical impression was listed as chronic fibrositis, and he planned to have

her continue on Ibuprofen, Amitriptyline, and her exercise activity. (Tr. 287).

On February 9, 1994, Plaintiff underwent a two hour physical capacity evaluation at Physical Therapy Associates. The evaluators noted that Plaintiff was "cooperative and demonstrated consistent, full participation in all the assessments and tasks. Significant restrictions noted during the evaluation were as follows:

> . . . . patient demonstrates below entry-level work ability for activity below 38" above floor level.
>
> 2. Decreased thoracolumbar spine, hip and upper extremity range of motion limits her tolerance to vertical or horizontal reaching, 6"-24" from her torso. During administration of the Minnesota Rate of Manipulation Standardized Test, patient performs in the 25th percentile for activity using her right dominant hand only, as compared to bimanual tasks with scores which range from the 5th to 8th performance percentiles.

(Tr. 289).

* * *

> 4. Demonstrated decreased cervical range of motion by inclinometer, especially left rotation and flexion. Functionally, her tolerance is limited for sustained even slight forward bent or awkward neck postures.
>
> 5. Demonstrated significant deconditioning in extremities and trunk for repetitive bending, sustained stand/walk and repetitive materials handling tolerance.

> 6. Reported moderate to high levels of reported pain symptoms. Pain diagram was within normal limits for diagnosis with multiple-site tender points.
>
> 7. Demonstrated sedentary work capacity with a projected part-time work tolerance at this level. Barriers to return to work include length of time off work (since October 1991), generalized deconditioning and poor to fair pain management skills. Ms. Forney also has given up driving, even for short distances, due to increased fibromyalgia symptoms.

(Tr. 290).

In addition to the narrative report, the Physical Therapy Associates evaluators completed a form on which they indicated their opinions of Plaintiff's residual functional capacity. In relevant part, it was noted that she was able to lift/carry/push/pull only up to 10 pounds occasionally and that she would not be able to do any such activities frequently. She was unable to kneel, crouch, crawl, or balance; she could rarely climb stairs; and she could only occasionally bend and reach. She could sit from zero to 30 minutes at a time up to 3 to 4 hours per 8 hour day; she could stand 30 minutes at a time, up to 3-4 hours per 8 hour day; and she could walk 30 minutes $1^1/_2$ hours at a time, up to 4 to 5 hours per 8 hour day. (Tr. 291).

HEARING TESTIMONY

On January 13, 1993, Plaintiff attended her first hearing before ALJ Kramer. At that time, she was not represented. (Tr. 260).

Plaintiff's Testimony At Her First Hearing:

Plaintiff testified that she worked until June 7, 1991, when school recessed for the summer months. She worsened over the summer, but returned to work in September, 1991. Thereafter, she worked through October 2, 1991, at which time the pain, burning, and fatigue caused by her fibromyalgia caused her to quit work.

She testified that she takes a prescription dose of Ibuprofen daily but that it does not control her pain. She described her pain as follows:

> It varies somewhat. A good day is more like having the flu and just being ache[y] all over. The severest form is when it, what I call fire, the muscles are burning. And that can go for days and then it will stop and then just be back to ache[y] and stiff and, but it's always present. It's never gone anywhere.

(Tr. 266).

She testified she could usually walk two miles; (Tr. 266) that she tries to do so once daily; that it takes her an hour to walk that far; and that by then, she's "tired and really burning." Describing her ability to sit, she stated, "Sittings uncomfortable. If I sit more than a few minutes it becomes unbearable almost." Addressing her ability to lift, she testified, "I could probably lift, I could lift probably between 15 and 20 pounds, if it wasn't repetitive." She could lift "very little" repetitively because the "pains in [her] shoulders become acute." (Tr. 267).

She engages in water aerobics daily, doing primarily stretching exercises for 15 minutes, then she treads water for a minute or so before using the jacuzzi. (Tr. 267).

Originally, she went to a health club for such activities, but she moved to an apartment expressly so that she could use its indoor pool. (Tr. 268).

Addressing her activities of daily living, Plaintiff testified she goes shopping for small amounts of groceries, but on a weekly basis, her husband accompanies her.

Plaintiff's Testimony At Her Second Hearing:

> At her second hearing, Plaintiff testified that she left her job for the following reasons:
>
> I could no longer do it physically. I couldn't do the job requirements. I couldn't do the lifting or the standing or anything it entailed that it really – I even had in the afternoon simple book work. I couldn't sit long enough to just to, to concentrate on it. All I could concentrate on was the pain . . .

(Tr. 55).

Asked about the medication she takes, Plaintiff testified that she takes Amitriptyline and Flexeril and has been doing so for about three years. (Tr. 57). She also takes Ibuprofen; however its effectiveness has diminished and is not taken in a lower dosage because of the risk of long-term use causing kidney damage. Plaintiff explained that the Ibuprofen takes the edge off the pain, and that "without it it's unbearable." (Tr. 58-59). "I'm still in pain but it's not quite as severe. Without it the burning is so intense that it's almost unbearable. With it, it seems to just – just on the edge of not being in the bed. I can, I can still move around with it." (Tr. 59).

Addressing the effect of her stopping work on her fibromyalgia, Plaintiff explained that "[b]y not working I can take care of myself. I mean when you're working once the pain starts in to be intense there's no way to relive it at all. Not working I can do whatever I feel I need to do. Like if it's stretching or if it's laying down or walking or whatever, out in the swimming pool or the spa or hot showers or – and these are things that go on on a regular basis . . . " (Tr. 60). Plaintiff also discussed her exercise program, explaining that it came from the Arthritis Foundation and that she and her doctor worked on it together. The program involves water aerobics in her swimming pool and walking. She described it and its effect on her symptoms as follows:

> A In a swimming pool. Treading water, laying on your stomach and holding on to the side and gently stretching your legs and your arms, walking back and forth in the pool. What else do I do?
>
> Q How long do you stand in the pool each time?
>
> A I'm in the pool a half an hour and then I'm in the spa for 10 minutes.
>
> Q . . . And you do that what time usually?
>
> A It's at nine. * * *
>
> Q And then what do you do during the day?
>
> A After that I'll – by then the burning is intense and I go home and –
>
> Q Does that – what does that do? What do you notice after you're in the pool and in the spa for a while?

A It increases. The pain begins to increase. The burning begins to increase.

Q The, the limited exercise seems to make your pain worse?

A All through, yeah.

Q And do you take your ibuprofen before you do this?

A Before.

Q * * * When do you do your walking?

A That's after I've rested. Usually by the time I do[,] the burning is intense by then and I have to take time to – either to rest – it just depends on how bad it is. I – sometimes just sitting for a little while or – little while I mean like a half an hour. Sometimes I have to lay down.

(Tr.62).

Q You mean after you're done with the pool exercises? * * *

A Right. Sometimes It's just a half an hour, but if I lay down it usually runs between a hour, hour and a half.

Q And you don't do anything during that period?

A No, I lay down – well I do. I work on the meditation techniques. * * *

Q And when you walk how far do you go and where do you go?

A I walk two miles a day. The store is – I walk from my, from my apartment to there and back it two miles. . . .

Q Do you go shopping or just walk and come back?

(Tr. 63).

A I just walk. I walk there mainly because inside the store there's a bench and if I can't continue that way I can sit for a little bit. I try to go through it just there and back.

Q Without stopping?

A Right.

Q How's that make you feel after you've done that? * * *

A After I've made the whole trip my knees are swollen and on fire, my legs are on fire and my back and my arms except for my left arm. It doesn't always bother me like the rest.

Q What do you do usually then when you get back?

A Well when I get back I sit down again or I do heat or I do ice or whatever I feel like will help to, to calm everything down. . . .

Q Do you do other exercises or stretching during the day?

A Oh, yeah, off and on most during the day. I do simple stretches in my living room. * * *

Q Now if you don't do these exercises, you don't go walking or do your water exercises how do you feel?

(Tr.64-65).

A If I don't do that, if I don't move the muscles like if – then I become so rigid that when I do get up to do it again then it's like starting all over, you know. It's just like you have to break the muscles apart or to stretch. It's, it's not good so I try not to –

Q So you do this every, every day?

A Every day I do it. Well Sunday I don't walk.

Q But you do go to the pool?

A Yeah, I go to the pool.

Q . . . how would you describe how your muscles feel? Is it, is it pain, is it fatigue, is it weakness, is it what?

A Well, it's all of those. The pain itself years ago was an achy pain, but because I'm using those muscles, I have to use the muscles it's a burning sensation and the burn is from low to high like a gas stove. Always there, never completely gone but it's up and it's down. . . .

Q Now are these in certain spots?

A It's – no, it goes almost everywhere. Across my shoulders, down my right arm, down to my elbows. I don't have any problem in. . . . forearms. they're all – and it's down both sides of my back. My lower back burns and, and aches. My upper legs burn. The knees are tight and burning all the time and the calves of my legs are affected but they're the least affected.

(Tr. 65-66).

Plaintiff testified that she does her housework in patchwork fashion. She does not do heavy housework such as clean the walls or the carpet, and if she vacuums, "that will be pretty much it and the only thing I do every day are the eating dishes." She estimated she might spend a total of an hour per day doing housework. (Tr. 66). She cooks dinner in the evening, "and that's usually, you know, one dish type thing or crock pot . . . " (Tr. 74).

Plaintiff's husband drives her to the store once daily, as an outing, and she occasionally walks to her parents house about five blocks away. (Tr. 66-67). While Plaintiff shops for items such as bread or milk, the main shopping is done with her husband, and he "does all of the carrying." (Tr. 73). Plaintiff estimated that she could lift 15 to 20 pounds once, but she wasn't certain how high she could lift it. (Tr. 73).

Plaintiff testified that she sees her treating physician, Dr. Cross, every three months. (Tr. 67-68). When asked if her condition had changed during the past year, she testified:

A It – well the changes have come in the form of burning rather than deep ache.

Q . . . That's the way your muscles feel?

A Right. And the fatigue. Fatigue is more now than before. . . . It's a shorter period of time where I'm really exhausted. Where before the fatigue would stay pretty much on a level scale to toward the end of the day but now it doesn't take very much until I'm just really – I'm worn out and I have to lay down.

Q You mean it's easier to get tired now?

A Right.

Q And when you say you're fatigued what do you mean exactly? I mean what does it feel like?

A Absolutely no energy. I just – I don't have energy to get up and move.

Q And how often does that happen?

A Well every day there's that – I'm fatigued by the end of the afternoon, one, two o'clock. Then I have to lay down.

Q In between there I'm really, really tired and but most of the time I can – if I can lay long enough I seem to regroup. But of course I don't do anything in the evenings after, after dinner. * * *

(Tr. 69).

Q . . . Do you usually nap then during – when you're – this fatigue hits you at one or two o'clock?

A Yes, I do. I lay down.

Q . . . Do you sleep or rest or –

A Sometimes I just rest. Maybe three or four times a week I fall asleep and then it will be two or three hours before I wake up.

(Tr. 70).

Lay Witness Testimony:

In addition to Plaintiff, Plaintiff's husband, Leon Forney, also testified at her second hearing. In relevant part, he testified as follows:

> . . . . I've noticed that she's, she's still real sincere about doing her water exercises and she does that every day. She's real sincere about keeping her muscles stretched out. I think she does that to help around the house. She doesn't want to be dependent . . . on me I guess. She's really strong willed in that way. And I try to help her out but she, she like to keep, keep going. But when it comes to any of the grocery

> shopping or anything like that if it's a loaf of bread she can carry it but if it's bigger shopping, I go, I take her. She can't drive my pickup anymore at all. So she hurts when she gets home and that's just to Wagners and back and that's only approximately a mile away driving it. She will not drive it anymore. And I unload all the groceries. . . .

(Tr. 77).

Medical Expert Testimony:

At Plaintiff's second hearing, psychologist, Peter Moulton, Ph.D., testified as a medical advisor. In relevant part, he testified as follows:

> Well, of course there is the history of pain which has been diagnosed as fibrositis and although there is in one of the reports, Exhibit 16, Dr. Reno's . . . report, there is a diagnosis of somatoform pain disorder. I am not going to give a somatoform pain disorder. There is certainly a significant preoccupation with pain and there's also – we have a good compliance it appears with treatment programs and has been an effort to deal with the pain with some effect. But in view of its being given the medical diagnosis and the compliance with treatment I'm [not] going to diagnose it as a somatoform pain disorder. There is secondary to pain[,] symptoms of depression which have been diagnosed in the record. Diagnosed as adjustment disorder. There has been treatment with medication with positive results. The Amitriptyline has been given for both depression and the sleep disorder and there has been improvement. There has been noted some impairment in memory and

> concentration which would be mild to moderate. . . . I believe that a diagnosis of an ongoing dysthymia, mild is warranted. . . .

(Tr. 79).

Dr. Moulton opined that Plaintiff's mental impairments did not meet or equal a listed impairment under the Secretary's regulations at 20 C.F.R. § 404, Subpart P, Appendix 1. (Tr. 80-81). However, in offering his opinion of Plaintiff's degree of limitation and capacity, Dr. Moulton expressly stated, "I'm not really [in]cluding the effects of pain. I mean by testimony and in the record the disruption of daily living and other activities because of pain may be significant. I'm not including that as a mental disorder. (Tr. 80).

It was Dr. Moulton's further opinion that Plaintiff's mental impairment resulted in *moderate* restrictions in the ability to understand and remember detailed instructions; the ability to carry out detailed instructions; the ability to maintain attention and concentration for extended periods; and the ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances. (Tr. 82).

Finally, Dr. Moulton testified that "some of the depressive symptoms might be a bit more severe than they might appear. She does exercise some bit of denial as has been mentioned." (Tr. 82).

Vocational Expert Testimony:

At Plaintiff's second hearing, the ALJ called Richard Ridenour as a vocational expert. As his first vocational hypothetical, the ALJ asked VE Ridenour to assume

Plaintiff had the specified age, education and vocational history. He asked him to assume also that she had the mental residual functional capacity as stated by Dr. Moulton and that she had the physical residual functional capacity as stated by Dr. Brennan, at Tr. 255-57. In response, VE Ridenour testified that Plaintiff could not return to her past relevant work, (Tr. 86) but that she could perform the following jobs:

> 1) Order clerk, food and beverage, DOT # 269.567-014, a sedentary, unskilled job; and
>
> 2) Telephone answering service operator, DOT # 235.662-026, a sedentary, semiskilled job, with an SVP of 3.

(Tr. 87).

As his second vocational hypothetical, the ALJ referred VE Ridenour to the exhibit at Tr. 290-91. Asked to assume those stated limitations along with Dr. Moulton's assessment of Plaintiff's mental residual functional capacity, VE Ridenour's opinion remained unchanged.

(Tr. 88-89).

The ALJ's Decision

In his decision, the ALJ found, in relevant part, as follows:

> 4. The claimant's testimony, and that of her husband, was not fully credible.

5. The claimant has the residual functional capacity to perform work as described in the decision above[1] . . .

6. The claimant is unable to perform her past relevant work as a head cook, a baker, and a manager of a school lunch room program.

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the limitations described in the decision above.

8. The claimant is 47 years old, which is defined as a younger individual . . .

9. The claimant has the equivalent of a high school education . . .

* * *

12. Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary work, at the hearing a vocational expert

---

[1] In the body of his decision, the ALJ described Plaintiff's found residual functional capacity in a confusing fashion, as follows:

. . . . I find that the claimant is capable of sedentary or light work within the ranges described below. * * * . . . limiting the claimant to work that does not involve lifting more than 15 to 20 pounds or walking more than two miles, and which allows her the ability to stand and change position at will, and * * * limiting the claimant in accordance with the functional capacity assessment described by Dr. Brennan and further considering the limitations described by Dr. Moulton . . . * * * Finally, given a hypothetical question based upon the physical capacity evaluation performed by Physical Therapy Associates, found in Exhibit 38, in addition to the same psychological limitations and vocational factors * * * As I have determined that the claimant can perform sedentary work as described on a full-time basis she would be able to perform the jobs of order clerk and answering service operator full-time. (Tr. 22).

testified that there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: food and beverage order clerk and telephone answering service operator. . . .

13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision. . . .

(Tr. 23-24).

ARGUMENT & LEGAL ISSUE

The legal issue is whether the final decision of the Secretary is supported by substantial evidence and based on the application of proper legal standards.

Reviewability and Standard Of Review

This court may set aside the Secretary's decision when the Secretary's findings are based on legal error or are not supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g); *Martinez v. Heckler,* 807 F.2d 771, 772 (9th Cir.1986). "Substantial evidence" means "more than a mere scintilla," *Richardson v. Perales,* 402 U.S. 387, 402 (1971) (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197 (1938)), but "less than a preponderance." *Sorenson v. Weinberger,* 514 F.2d 1112, 1119 n. 10 (9th Cir.1975). It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson,* 402 U.S. at 402 (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

In conducting its review, this court must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the Secretary's

conclusion. *Jones v. Heckler,* 760 F.2d 993, 995 (9th Cir.1985).

Disability and The Sequential Evaluation

The Social Security Act provides that certain individuals who are "under a disability" shall receive disability benefits. 42 U.S.C. § 423(a)(1)(D). The statutory concept of *"disability"* is comprised of a *medical* and a *vocational* element. The Act defines *disability* as the ***"inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months."*** 42 U.S.C. § 423(d)(1)(A). This is the *medical* component of the statutory definition of disability.

The Act also provides that a claimant will be found disabled only if his impairment(s) ***"are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . . "*** 42 U.S.C. § 423(d)(2)(A). This is the *vocational* component of the definition of disability.

The Secretary implements the foregoing definition through a 5-step sequential inquiry into whether or not a claimant should be considered "disabled." 20 C.F.R. § 404.1520(b)-(f). Five questions are posed in sequence until a question is answered affirmatively or negatively in such a way that a finding of disability or non-disability is directed. The claimant bears the burden of proof at steps 1 through 4. At step 5, the burden shifts to the Secretary.

In the instant case, steps 1 through 3 are not at issue. At step four, the ALJ found that Plaintiff retained the above-referenced residual functional capacity, but that she could not return to her past relevant work. Plaintiff does not contest the ALJ's finding regarding her ability to perform her past relevant work; she does, however, contest his finding as to her residual functional capacity. At step 5, the ALJ found that Plaintiff could perform full-time sedentary work (as described) and that she could perform two alternate jobs: food and beverage order clerk and telephone answering service operator. Plaintiff also contests this finding.

When the entire record is examined, there is not substantial evidence to support the ALJ's findings. The ALJ's decision must be reversed because it is based on improper legal standards as well.

The ALJ Failed To Reject Treating Physician Cross' Opinion by Correct Legal Standards

If there is a conflict between the opinions of treating and examining physicians, "[i]f the ALJ wishes to disregard the opinion of the treating physician, he . . . must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Murray v. Heckler,* 722 F.2d 499, 502 (9th Cir.1983). The rationale behind affording the treating physician's opinion greater weight is that "he is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Winans v. Bowen,* 853 F.2d 643, 647 (9th Cir. 1987), *quoting Sprague v. Bowen,* 812 F.2d 1226, 1230 (9th Cir. 1987).

Furthermore, the inability of reporting physicians to support their opinions with objective findings does not constitute the required clear and convincing reason to reject uncontroverted opinions. *Montijo v. Sec. of HHS*, 729 F.2d 599 (9th Cir. 1984). *See also, Rhodes v. Schweiker*, 660 F.2d 722 (9th Cir. 1981); *Day v. Weinberger*, 522 F.2d 1154 (9th Cir. 1975). Based on the rule of *Montijo*, the inability of treating physicians to support their opinions with objective findings cannot form the basis for rejecting such an opinion. The foregoing principles are summarized in *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988), as follows:

> We have made it clear that the medical opinions of a claimant's treating physicians are entitled to special weight and that, if the ALJ chooses to disregard them, "he must set forth specific, legitimate reasons for doing so, and this decision must be based on substantial evidence." *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986); *see Summers v. Bowen*, 813 F.2d 241, 243 (9th Cir. 1987); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). "The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Cotton*, at 799 F.2d at 1408. Even if a treating physician's opinion is controverted, the ALJ must provide specific, legitimate reasons for rejecting it. *Id.*
>
> * * *
>
> To say that medical opinions are not supported by sufficient objective findings or are contrary to the preponderant conclusions mandated by the objective findings does not achieve the level of specificity our prior cases have required, even when the objective factors are listed seriatim. The ALJ must do more than offer his conclusion. He must set forth his own interpretations and explain why they, rather than the doctors', are correct. *Moreover the ALJ's analysis does not give proper weight to the subjective elements of the doctors' diagnoses.* The subjective judgments of treating physicians are important, and properly play a part in their medical evaluations. *Accordingly, the ultimate conclusions of those physicians must be given substantial weight;* they cannot be disregarded unless clear and convincing reasons for doing so exist and are set forth in proper detail. *See Delgado v. Heckler*, 722 F.2d 570, 574 (9th Cir. 1983). (Underlined emphases added.)

Embrey, at 421-22.

In the instant case, the ALJ addressed Dr. Cross' opinion of Plaintiff's residual functional capacity at Tr. 15, in relevant part, as follows:

> On July 26, 1991, [Dr. Cross'] chart notes reveal that her fibrositis and hypertension were controlled. However, on October 7, 1991, he reported that she was no longer able to work because the pain was too great for the amount of time she spent on her feet. He continued describe her as incapable of working as a cook or a baker through January 6, 1992, and said that she was unable to stand for more than 15 minutes at a time, walk for more than 20 minutes at a time, lift more than 15 pounds, or carry more than 15 pounds for more than 30 feet. He stated that she could "maybe" work two hours of an eight hour day. . . .

(Tr. 15).

The ALJ rejected Dr. Cross' above-referenced opinion as follows:

> . . . . Dr. Cross has not recently expressed an opinion, and subsequent to his statement that the claimant might be limited to two hours per day (with apparent reference to her work as a cook), he has repeatedly reported that her condition has improved or stabilized. Even the claimant herself acknowledges that she is capable of more activity than that encompassed by two hours per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. Although the claimant stated that her doctor supports her contention that she cannot return to work, it is conceded that she cannot return to work *as a baker or a cook*. Other work is not precluded by a statement that she could not return to work she had been doing in the past.

(Tr. 21).

To the extent the ALJ rejected Dr. Cross' assessment of Plaintiff's residual functional capacity as being limited to an opinion of what Plaintiff could do in her job as a cook, there is no support for the ALJ's rationale. Dr. Cross did not even address the physical demands required in Plaintiff's job as a cook. His statement set forth in his January 6, 1992, letter to the Secretary was written *after* he had advised Plaintiff to quit work, and it was expressly limited to setting forth his opinion of her functional capacity in an 8-hour day. (See Tr. 164).

As for Dr. Cook's reporting that Plaintiff's condition has improved or stabilized, when one examines the actual underlying chart notes, it readily becomes apparent that

Dr. Cross' statements of improvement pre-dated her quitting work or related to a period of exacerbation in March and April 1993, following which her exacerbated state improved. His characterization of Plaintiff's chronic fibromyalgia as "stable" (see Tr. 286) simply references its return to its chronic debilitating state following treatment of the exacerbation. That characterization does not imply that Plaintiff's fibromyalgia is no longer disabling as the ALJ purports to find.

Finally, the ALJ's statement to the contrary, Plaintiff did not acknowledge that she is capable of more activity than that encompassed by two hours per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. Plaintiff's housework is spread out over the day and week; her exercise routine is prescribed treatment, not work activity; it is followed by rest; and it is performed at the sub-sedentary activity level, fully consistent with Plaintiff's testimony, Dr. Cross' opinion, and the assessment of the Physical Therapy Associates.

The ALJ Failed To Reject Lay Testimony By Correct Legal Standards

The law in the Ninth Circuit is clear that while the Secretary may choose to disregard or discredit subjective pain testimony, he must support his decision to do so with specific findings. *Gamer v. Secretary of HHS*, 815 F.2d 1275, 1279 (9th Cir. 1987); *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986). Furthermore, in *Hammock v. Bowen*, 879 F.2d 498, 503 (9th Cir. 1989), this court held as follows:

> "The Secretary cannot insulate ultimate conclusions regarding disability from review by turning them into questions of 'credibility.' " *Jones*, 760 F.2d at 997; *see also Hale v. Bowen*, 831 F.2d 1007, 1012 (11th Cir. 1987) ("if the Secretary fails to articulate reasons for refusing to credit a claimant's subjective pain testimony, then the Secretary, as a matter of law, has accepted that testimony as true").

In *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993), the Ninth Circuit summarized the standard by which an ALJ may reject a claimant's subjective testimony as follows:

> If there is medical evidence establishing an objective basis for some degree of pain and related symptoms, and no evidence affirmatively suggesting that the claimant was malingering, the Secretary's reason for rejecting the claimant's testimony must be "clear and convincing," *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989), and supported by specific findings, *Varney*, 846 F.2d at 584. It's not sufficient for the ALJ to make only general findings; he must state which pain testimony is not credible and what evidence suggests the complaints are not credible. *Id.* He "must either accept [claimant's] testimony or make specific findings rejecting it." *Id.*

In the instant case, medical evidence establishes an "objective basis for some degree of the symptom and no evidence affirmatively suggests that the claimant was malingering." Accordingly, the ALJ's reasons for rejecting Plaintiff's excess symptom testimony must be clear and convincing. The medical record is consistent with Plaintiff's description of her limitations and the nature of her

physical impairments. For the ALJ to reject this testimony without supporting his decision to do so with clear and convincing reasons is reversible legal error.

Addressing an ALJ's attempt to turn disability determinations into questions of "credibility," in *Hammock v. Bowen*, 867 F.2d 1209, 1214 (9th Cir. 1989), the Ninth Circuit held:

> "The Secretary cannot insulate ultimate conclusions regarding disability from review by turning them into questions of 'credibility.' " *Jones*, 760 F.2d at 997; *see also Hale v. Bowen*, 831 F.2d 1007, 1012 (11th Cir. 1987) ("[I]f the Secretary fails to articulate reasons for refusing to credit a claimant's subjective pain testimony, then the Secretary, as a matter of law, has accepted that testimony as true."). In *Varney II*, we adopted the *Hale* rule of the Eleventh Circuit in the limited situation where the record has been fully established and the sole remaining issue is the credibility of the claimant's pain testimony. *Varney v. Secretary of Health and Human Servs.*, 859 F.2d 1396, 1401 (9th Cir. 1988) (Varney II).

In the instant case, the ALJ discredited Plaintiff's testimony for the following reasons:

> . . . . The record reflects significant discrepancies and/or omissions between the claimant's reports to various medical personnel and to the agency. She alleges severe, incapacitating pain in one instance, and then, on another, states that her condition has undergone significant improvement with treatment and medication. She told Dr. Schrader that her pain management was better than it was a year previously, and

that pain no longer controlled her life, a statement which is substantially reproduced in her reports to Dr. Cross, and yet she told Dr. Brennan that her generalized muscular pain was a "10" on a scale of 1 to 10. In the latter instance, she was aware that she was undergoing a physical examination with emphasis on evidence of fibrositis and its severity.

* * *

. . . . Even after considering her assertions of extreme pain, Dr. Brennan found that she was capable of sitting for up to six hours a day, walking or standing up to three hours a day, and occasionally lifting 10 to 15 pounds. The physical capacities evaluation likewise found that she was capable of sedentary work, and, although a further reduction to part-time work was noted, that reduction was based upon tests which are capable of distortion based upon equivocal effort, as previously discussed.

The claimant's activities are commensurate with a capacity for sedentary work, and even occasional light work. Another example of her somewhat misleading testimony is that she failed to mention at the hearing that she can occasionally clean her whole house in one day[2]. Her list of daily activities is quite broad, and while it is noted that she does not drive, apparently the only vehicle available is a pick-up truck. She

[2] This information was in the record before the ALJ (see Tr. 286). If the ALJ deemed it important, one must ask why he failed to ask Plaintiff about it. One must also ask how the ALJ can attribute Plaintiff's failure to mention this to her evasiveness when, at the same time, she also failed to mention that she "suffers for it the next day."

does housework, exercises, cooks, reads, and goes shopping daily. She does more extensive activities several times a week. The record does not support a conclusion that she must lie down for a protracted period every day, and Dr. Brennan did not note such a significant disruption in her ability to perform activities during the day. Therefore I conclude that this resting period is not medically imperative.

* * *

. . . . Even the claimant herself acknowledges that she is capable of more activity than that encompassed by two hours per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. * * *

The claimant's demeanor at the hearing was not indicative of an individual who is experiencing disabling incapacity; she did not appear to be in pain or require a period in which to rest.[3] She was capable of attention to all questions asked, and her responses were rational, although somewhat evasive. Her medications are very conservative, but even this conservative treatment has produced considerable relief of her symptoms. For example, she no longer has difficulty sleeping regularly, she no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony.

(Tr. 20-21).

[3] As Tr. pages 260 and 282 establish, Plaintiff's first hearing lasted 35 minutes. At Tr. pages 52 and 95 establish, Plaintiff's second hearing last 1 hour and 10 minutes.

None of the foregoing legitimizes the ALJ's rejection of Plaintiff's testimony. It does illustrate the ALJ's single minded determination to interpret the record against Plaintiff and to justify a predetermined decision to deny her benefits, however. There is nothing in the record to suggest that Plaintiff exaggerates her symptoms or that she was evasive. Dr. Schrader expressly stated that Plaintiff's MMPI profile was consistent with her diagnosis of fibrositis and that there was no evidence of a tendency to exaggerate her symptoms. (Tr. 237). Further, in the report of her two-hour physical capacities evaluation, Physical Therapy Associates expressly noted that Plaintiff demonstrated consistent, full participation in all the assessments and tasks. Further, the reliability tests noted at Tr. 292 were all normal.

As for the ALJ's comments on Plaintiff's demeanor, he does not describe her demeanor at all. He simply disparages it in an apparent attempt to protect his conclusion from review. The ALJ's finding is not a legitimate credibility finding; it is nothing more than the infamous "sit and squirm" method of jurisprudence which has been condemned in this circuit for years. In *Gallant v. Heckler,* 753 F.2d 1450, 1454-55 (9th Cir. 1984), the Ninth Circuit condemned such tactics in the following fashion:

> The ALJ found Gallant's allegations of disabling pain not credible or convincing. In making this determination, the ALJ stated he considered claimant's testimony, the objective medical evidence, claimant's daily activities and claimant's demeanor at the hearing. *While the ALJ can disregard a claimant's self-serving statements, to do so they must be unsupported by objective findings. Maounis v. Heckler,* 738 F.2d 1032, 1034 (9th Cir. 1984) (Emphasis added). . . .
>
> The ALJ in part based his rejection of the objective medical evidence and the claimant's subjective complaints of constant pain on Gallant's demeanor at the hearing, noting that he sat for over an hour without any apparent distress. The fact that a claimant does not exhibit physical manifestations of prolonged pain at the hearing provides little, if any, support for the ALJ's ultimate conclusion that the claimant is not disabled or that his allegations of constant pain are not credible, *Day v. Weinberger,* 522 F.2d 1154, 1156-57 (9th Cir. 1975). No clear and convincing reasons were provided by the ALJ for his rejection of the testimony of Gallant regarding his constant and persistent back pain. *Gallant,* at 1455.

Additionally, in *Perminter v. Heckler,* 765 F.2d 870, 872 (9th Cir. 1985), the Ninth Circuit had the following to say about an ALJ's reliance on his personal observations of the claimant at the hearing:

> The ALJ's reliance on his personal observations of Perminter at the hearing has been condemned as "sit and squirm" jurisprudence. *Freeman v. Schweiker,* 681 F.2d 727, 731 (11th Cir. 1982). Denial of benefits cannot be based on the ALJ's observation of Perminter, when Perminter's statements to the contrary, as here, are supported by objective evidence. *Coats v. Heckler,* 733 F.2d 1338, 1341 (9th Cir. 1984).

In *Montijo v. Secretary,* 729 F.2d 599, 601 (9th Cir. 1984), citing *Lewis v. Weinberger,* 541 F.2d 417, 421 (4th Cir.

1976), the court noted that in cases involving alleged psychological disability, the ALJ's observation of the claimant at the hearing does not provide a sufficient reason to reject otherwise uncontroverted medical evidence. *Montijo*, at 602.

In *Jones v. Heckler*, 760 F.2d 993, 997 (9th Cir. 1985), the Ninth Circuit addressed a case which included typical ALJ language impugning an applicant's credibility due to an alleged disparity between complaints and findings. Noting, however, that the complaints were, in fact, supported by the medical records, the court stated that the Secretary cannot insulate ultimate conclusions regarding disability from Court review by turning them into questions of credibility.

Plaintiff submits that the Secretary's case hinges entirely upon turning this case into one of credibility, and, by doing so, he expressly attempts to insulate his ultimate conclusions from court review. Pursuant to the law of this circuit, that attempt must fail.

The ALJ's failure to specify legitimate reasons for discounting symptom testimony is legal error. The Secretary cannot meet her legal burden merely by citing a discrepancy between subjective complaints and objective findings (especially when, as here, no such discrepancy exists). If the record is complete and the claimant would be disabled if symptom testimony were credited, the testimony is deemed to be true and the court will find the claimant disabled. *Varney v. Secretary of HHS*, 859 F.2d 1396 (9th Cir. 1988) (*Varney II*). In *Varney II*, the Ninth Circuit held on this issue as follows:

> In cases where there are no outstanding issues that must be resolved before a proper disability determination can be made, and where it is clear from the administrative record that the ALJ would be required to award benefits if the claimant's excess pain testimony were credited, we will not remand solely to allow the ALJ to make specific findings regarding that testimony. Rather we will follow the Eleventh Circuit's practice and take that testimony to be established as true.

Varney II, at 1401.

It is self-evident that if Plaintiff is limited as she testified and as her treating physician opined, she is disabled. Indeed, at Plaintiff's hearing held January 13, 1993, addressing Dr. Cross' opinion that Plaintiff was restricted to a two hour workday, the ALJ stated, "[I]t's obvious that if I accepted that as true that the claimant would have to be found disabled." (Tr. 280). Accordingly, when Plaintiff's testimony is credited, a finding of disability follows, and this court should direct an award of benefits. In accordance with *Varney II*, remand for specific findings is unnecessary.

Apart from improperly discrediting Plaintiff's testimony, the ALJ also failed properly to reject the testimony of Plaintiff's husband, Leon Forney. Indeed, the ALJ appears not to have addressed a single word to explaining his rejection of such testimony. In *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987), the Ninth Circuit noted that friends and relatives in a position to observe a claimant's symptoms and daily activities can provide competent evidence to substantiate medical opinions of

record, or to show directly how an impairment affects the claimant's ability to work. Further, the court held –

> Disregard of this evidence violates the Secretary's regulation that he will consider observations by non-medical sources as to how an impairment affects a claimant's ability to work. 20 C.F.R. § 404.1513(e)(2).

Id.

Finally, in *Dodrill, supra,* the Ninth Circuit held as follows:

> . . . . An eyewitness can often tell whether someone is suffering or merely malingering. While this is particularly true of witnesses who view the claimant on a daily basis, the testimony of those who see the claimant less often still carries some weight. If the ALJ wishes to discount the testimony of the lay witnesses, he must give reasons that are germane to each witness.

Dodrill, at 919.

The ALJ's failure to base his rejection of lay testimony on the record and to give reasons germane to each witness is reversible error.

Step Five Of The Sequential Analysis

Once a claimant shows she can no longer perform past relevant work (step four), *the burden of persuasion shifts to the Secretary* to show that the claimant can engage in other substantial gainful activity (step five). *Bonilla v. Secretary HEW,* 671 F.2d 1245 (9th Cir. 1982). As noted, the

ALJ expressly found that Plaintiff *cannot* perform her past relevant work.

At step five, to show that a claimant can engage in other work, the Secretary may, as in the instant case, call upon a VE. The ALJ then poses one or more vocational hypotheticals detailing the claimant's physical and mental residual functional capacities. The VE considers all the limitations set forth in the hypothetical, and determines whether the claimant, **in light of the limitations posed in the hypothetical,** is able to perform other work which exists in the national economy. In the instant case, there are two problems with the VE's testimony. First, it was given in response to a vocational hypothetical which did not include all of Plaintiff's limitations. Second, the VE's testimony contains critical errors necessitating reversal of the ALJ's decision. As to the first problem, in *Gallant v. Heckler,* 753 F.2d 1450, 1456 (9th Cir. 1984), the Ninth Circuit stated, in relevant part, as follows:

> A vocational expert's testimony in a disability benefits proceeding "is valuable only to the extent that it is supported by medical evidence." *Sample v. Schweiker,* 694 F.2d 639, 643-44 (9th Cir. 1982).
>
> * * *
>
> If the assumptions in the hypothetical are not supported by the record, the opinion of the vocational expert that claimant has a residual working capacity has no evidentiary value.

Accordingly, that aspect of vocational expert Ridenour's testimony which was based on the exclusion of Dr. Cross' opinion, Plaintiff's testimony, the testimony

of Plaintiff's witness, and the Physical Therapy Associate's assessment has no evidentiary value and must be discounted.

The second problem with the VE's testimony is more complicated. As noted in footnote 1, above, the ALJ's finding regarding Plaintiff's physical functional capacity is confusing. It appears to be based on three separate vocational hypotheticals. These three vocational hypotheticals then formed the basis of the ALJ's finding Plaintiff can perform "sedentary work as described on a full-time basis . . . " (Tr. 22).

First, Plaintiff notes that, "as described" in Dr. Brennan's report, plaintiff is restricted to *occasionally* lifting 10-15 pounds. She is not able to *frequently* lift any weight. (See Tr. 255). Further, she is restricted to an unspecified degree from reaching. (Tr. 256).

Second, Plaintiff notes that, "as described" in the physical capacity evaluation performed by Physical Therapy Associates, Plaintiff is *occasionally* able to lift and carry up to 10 pounds but she is unable to *frequently* lift or carry any weight. Further, she is able to *reach* only *occasionally*. (Tr. 291)

The Vocational Expert Testimony Is Inaccurate, Directly Contradicting Information Contained In The DOT And SCO

As discussed below, critical aspects of the vocational testimony are inaccurate and cannot constitute substantial evidence to support the ALJ's decision. The ALJ erred by relying on VE testimony which conflicts with the Secretary's own resources. In determining the skill level

of a claimant's past work, and in evaluating whether the claimant is able to perform other work, the Secretary routinely relies on the *Dictionary of Occupational Titles (DOT)* and its companion volume, *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCO)*, published by the U.S. Dep't of Labor. *Villa v. Heckler*, 797 F.2d 794, 798 (9th Cir. 1986). See also, 20 C.F.R. §§ 404.1566(d)(1) and 416.966(d)(1). (*DOT* is the Secretary's primary source of reliable job information).

In *Terry v. Sullivan*, 903 F.2d 1273 (9th Cir. 1990), the Ninth Circuit reversed the Secretary's decision, finding the plaintiff's argument particularly persuasive because it relied entirely on the Secretary's own resources – namely the *DOT* and *SCO*. In *Terry*, just as in the instant case, the ALJ has impermissibly relied on vocational testimony which conflicted with the *DOT* and the *SCO*.

As the *Terry* court noted, one feature of the *SCO* is that it assigns to each job a number that reflects its specific vocational preparation (SVP) time – *i.e.*, how long it generally takes to learn the job. (*See Terry*, at 1276). Another feature of the *SCO* is explained in SSR 83-14, in relevant part, as follows:

> **POLICY STATEMENT:** The term "exertional" has the same meaning in the regulations as it has in the United States Department of Labor's publication, the *Dictionary of Occupational Titles* (DOT). In the DOT supplement, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (SCO), occupations are classified as sedentary, light, medium, heavy, and very heavy according to the degree of primary strength requirements of the occupations. These

consist of three work positions (standing, walking, and sitting) and four worker movements of objects (lifting, carrying, pushing, and pulling).

* * *

. . . In the SCO, where specific occupations have critical demands for certain physical activities, they are rated for climbing or balancing; stooping, kneeling, crouching or crawling; reaching, handling, fingering, or feeling; talking or hearing; and seeing (bold emphasis added).

(See Plaintiff's Exhibit A, for the complete text of SSR 83-14).

In the instant case, just as in *Terry*, the *SCO* establishes that the vocational expert's testimony is erroneous. Therefore, the Secretary's decision, which is based on that erroneous testimony, must be reversed.

As evidenced above, the VE used the *DOT* as a source to identify titles of occupations Plaintiff purportedly could perform; however, certain aspects of the vocational expert's testimony directly contradict the *DOT* and the *SCO*.

At Appendix C, pages C-1 through C-4 of the *SCO*, the critical physical demand components of jobs are discussed and defined. Of particular relevance to the instant case is the definition of the physical activity of *reaching*, defined as follows on page C-3 of the *SCO* appendix[4]:

---

[4] See Plaintiff's Exhibit B for *SCO* Appendix C, pp. 1-4.

8. REACHING

Extending hand(s) and arm(s) in any direction. In Part A, the rating for the Reaching component appears eighth in the first Physical Demand column under the vertical heading **Re.**

As noted above, the ALJ found Plaintiff's residual functional capacity is as described in the referenced exhibits, except that she can engage in sedentary work on a full-time basis. Juxtaposing the ALJ's findings upon the foregoing definition excerpted from the *SCO*, it is apparent that Plaintiff is precluded from performing work which entails more than *occasional* **reaching.** Accordingly, as shown below, Plaintiff is precluded from performing both jobs the VE identified, *i.e.*, food and beverage order clerk and telephone answering service operator.

As noted by the VE, the job of order clerk, food and beverage, is assigned *DOT* classification #269.567-014 and telephone answering service operator is assigned *DOT* classification #235.662-026. (See Plaintiff's Exhibit C, pp 1-2 for the narrative *DOT* descriptions of these jobs). On pages 335 and 338 of the *SCO*, these two jobs are rated according to the extent to which they involve critical physical demands, including *reaching* (**Re**). The frequency which which each physical demand occurs in a given job is designated by a code – N, F, O, or C, defined as follows:

Code	Frequency	Definition
N	Not Present	Activity or condition does not exist.
O	Occasionally	Activity or condition exists up to 1/3 of the time.
F	Frequently	Activity or condition exists from 1/3 to 2/3 of the time.
C	Constantly	Activity or condition exists 2/3 or more of the time.

As page 335 of the *SCO* reveals, the job of food and beverage order clerk requires *frequent* (from 1/3 to 2/3 of the time) **reaching.** (See Plaintiff's Exhibit D, page 1).

As page 338 of the *SCO* reveals, the job of telephone answering service operator requires *constant* (2/3 or more of the time) **reaching.** (See Plaintiff's Exhibit D, page 2).

Based on the *SCO*, both jobs are incompatible with Plaintiff's limitations, as found by the ALJ. The VE's contrary testimony is erroneous, and the ALJ's reliance thereon is reversible error.

CONCLUSION

The decision of the Secretary is not supported by substantial evidence, nor have the proper legal standards been applied. Accordingly, the Secretary's final order

should be reversed and Plaintiff should be found disabled, as alleged.

Respectfully submitted,

/s/ Ralph Wilborn
RALPH WILBORN, OSB #84104
Of Attorneys for Plaintiff

(PPS-105) **SSR 83-14**

PLAINTIFF'S EXHIBIT A

TITLES II AND XVI: CAPABILITY TO DO OTHER WORK – THE MEDICAL – VOCATIONAL RULES AS A FRAMEWORK FOR EVALUATING A COMBINATION OF EXERTIONAL AND NONEXERTIONAL IMPAIRMENTS

PURPOSE: To clarify how the table rules in Appendix 2, Subpart P, Regulations No. 4, provide a framework for decisions concerning persons who have both a severe exertional impairment and a nonexertional limitation or restriction.

CITATIONS (AUTHORITY): Sections 223(d)(2)(A) and 1614(a)(3)(B) of the Social Security Act; Regulations No. 4, Subpart P, sections 404.1505(a), 404.1520(f)(1), 404.1545, 404.1560-404.1569; Appendix 2 of Subpart P, section 200.00(e)(2); and Regulations No. 16, Subpart I, sections 416.905(a), 416.920(f)(1), 416.945, 416.960-416.969.

PERTINENT HISTORY: No table rule applies to direct a conclusion of "Disabled" or "Not disabled" where an individual has a nonexertional limitation or restriction

imposed by a medically determinable impairment. In these situations, the table rules are used, in conjunction with the definitions and discussions provided in the text of the regulations, as a framework for decisionmaking.

This Program Policy Statement (PPS) clarifies the distinction between exertional and nonexertional limitations and explains how the latter affect performance of work activities. The PPS also explains how to evaluate the vocational effects of nonexertional impairments within the context of the exertionally based table rules where claimants or beneficiaries also have severe exertional impairments that limit them to sedentary, light, or medium work.

See the cross-reference section at the end of this PPS for related PPS's, the first one of which contains a glossary of terms used.

POLICY STATEMENT: The term "exertional" has the same meaning in the regulations as it has in the United States Department of Labor's publication, the *Dictionary of Occupational Titles* (DOT). In the DOT supplement, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (SCO), occupations are classified as sedentary, light, medium, heavy, and very heavy according to the degree of primary strength requirements of the occupations. These consist of three work positions (standing, walking, and sitting) and four worker movements of objects (lifting, carrying, pushing, and pulling).

Any functional or environmental job requirement which is not exertional is "nonexertional." In the disability programs, a nonexertional impairment is one which is medically determinable and causes a nonexertional limitation

of function or an environmental restriction. Nonexertional impairments may or may not significantly narrow the range of work a person can do. In the SCO, where specific occupations have critical demands for certain physical activities, they are rated for climbing or balancing; stooping, kneeling, crouching or crawling; reaching, handling, fingering, or feeling; talking or hearing; and seeing. Occupations are also rated for certain environmental conditions (e.g., high humidity or excessive dust). With respect to job complexity, occupations are rated by the training time required for average performance. Further, the occupational code numbers assigned to jobs reflect different levels of complexity in dealing with data, people, and objects. Narrative occupational descriptions in the DOT explain what is generally done in the job.

Effects of Nonexertional Impairments

Maintaining body equilibrium; using the fingers and finger tips to work with small objects; using the eyes and ears to see and hear; and using the vocal apparatus to speak are considered nonexertional activities. Limitations of these functions can affect the capacity to perform certain jobs at all levels of physical exertion. An entire range of jobs can be severely compromised. For example, section 201.00(h) of Appendix 2 calls attention to the fact that bilateral manual dexterity is necessary for the performance of substantially all unskilled sedentary occupations.

Mental activities are also nonexertional. Jobs at various levels of complexity require mental functions such as intellectual competence and ability to function in terms of

behavior, affect, thought, memory, orientation and contact with reality. Exposure to particular work stresses may not be medically sustainable for some persons with mental impairments, as would be the case with some persons who have physical impairments (e.g., certain cardiovascular or gastrointestinal disorders). Depending on the nature and extent of a person's mental impairment which does not meet or equal the criteria in the Listing of Impairments, relatively broad or narrow types of work may be precluded (e.g., dealing with a variety of abstract and concrete variables with nonverbal symbolism – a highly skilled level of work – or dealing frequently with members of the public – a particular type of work at any level of complexity). Although mental impairments as such as considered to be nonexertional, some conditions (e.g., depression or a conversion reaction) may also affect a person's exertional capacity.

Working conditions (environmental demands) which a person may not be able to tolerate as a result of an impairment include exposure to extremes of heat or cold, humidity, noise, vibration, hazards, fumes, dust, and toxic conditions. Physical limitation of function may be linked with an environmental restriction (e.g., a respiratory impairment may diminish exertional capacity as well as restrict a person to types of work not requiring exposure to excessive dust or fumes). In other cases, functional ability may not be impaired by an environmental restriction (e.g., a person may be able to do anything so long as he or she is not near dangerous moving machinery, on unprotected elevations, or in contact with certain substances to which he or she is allergic).

After it has been decided that an impaired person can meet the primary strength requirements of sedentary, light, or medium work – sitting, standing, walking, lifting, carrying, pushing, and pulling – a further decision may be required as to how much of this potential occupational base remains, considering certain nonexertional limitations which the person may also have. For example, at all exertional levels, a person must have certain use of the arms and head to grasp, hold, turn, raise, and lower objects. Most sedentary jobs require good use of the hands and fingers. In jobs performed in a seated position which require the operation of pedals or treadles, a person must have the use of his or her legs and feet. Relatively few jobs in the national economy require ascending or descending ladders and scaffolding. Two types of bending must be done frequently (from one-third to two-thirds of the time) in most medium, heavy, and very heavy jobs because of the positions of objects to be lifted, the amounts of weights to be moved, and the required repetitions. They are stooping (bending the body downward and forward by bending the spine at the waist) and crouching (bending the body downward and forward by bending both the legs and spine). However, to perform substantially all of the exertional requirements of most sedentary and light jobs, a person would not need to crouch and would need to stoop only occasionally (from very little up to one-third of the time, depending on the particular job).

For additional discussions of nonexertional impairments, see SSR 83-13, PPS-104, Capability to Do Other Work – The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments.

Evaluating the Claim

Section 200.00(e)(2) of Appendix 2 provides that, "where an individual has an impairment or combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a frame-work for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations. Also, in these combinations of nonexertional and exertional limitations which cannot be wholly determined under the rules in this Appendix 2, full consideration must be given to all of the relevant facts in the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations, which will provide insight into the adjudicative weight to be accorded each factor."

Disabled Based on Strength Limitations Alone

Where a person's residual functional capacity (RFC), age, education, and work experience coincide with the criteria of an exertionially based rule in Table No. 1, 2, or 3 – and that rule directs a conclusion of "Disabled" – there is no need to consider the additional effects of a nonexertional impairment since consideration of it would add nothing to the fact of disability. A written determination or decision supporting a conclusion must specify the

rule in Appendix 2 which directs such conclusion. It must also reflect consideration of the individual steps of the sequential evaluation process specified in sections 404.1520 and 416.920 of the regulations. There must also be findings of fact based on the evidence in the individual claim which leads to the conclusion that the individual is not exertionally capable of doing work different from past work, considering the medical and vocational factors. (See SSR 83-11, PPS- 102, Capability to Do Other Work – The Exertionally Based Medical-Vocational Rules Met.)

The Exertionally Based Rules as a Framework for Evaluating Additional Impairments of a Nonexertional Nature

Where a person cannot be found disabled based on strength limitations alone, the rule(s) which corresponds to the person's vocational profile and maximum sustained exertional work capability (Table No. 1, 2, or 3) will be the starting point to evaluate what the person can still do functionally. The rules will also be used to determine how the totality of limitations or restrictions reduces the occupational base of administratively noticed unskilled sedentary, light, or medium jobs.

A particular additional exertional or nonexertional limitation may have very little effect on the range of work remaining that an individual can perform. The person, therefore, comes very close to meeting a table rule which directs a conclusion of "Not disabled." On the other hand, an additional exertional or nonexertional limitation may substantially reduce a range of work to the extent that an individual is very close to meeting a table rule which directs a conclusion of "Disabled."

Use of a vocational resource may be helpful in the evaluation of what appear to be "obvious" types of cases. In more complex situations, the assistance of a vocational resource may be necessary. The publications listed in sections 404.1566 and 416.966 of the regulations will be sufficient for relatively simple issues. In more complex cases, a person or persons with specialized knowledge would be helpful. State agencies may use personnel termed vocational consultants or specialists, or they may purchase the services of vocational evaluation workshops. Vocational experts may testify for this purpose at the hearing and Appeals Council levels. In this PPS, the term vocational specialist (VS) describes all vocational resource personnel.

Examples of Evaluation Involving Combinations of Exertional and Nonexertional Limitations

1. *Sedentary exertion combined with a nonexertional impairment.* Example 1 of section 201.00(h) in Appendix 2 illustrates a limitation to unskilled sedentary work with an additional loss of bilateral manual dexterity that is significant and, thus, warrants a conclusion of "Disabled." (The bulk of unskilled sedentary jobs requires bilateral manual dexterity.) An example of nonexertional impairment which ordinarily has an insignificant effect on a person's ability to work is an allergy to ragweed pollen. Many individuals who have this allergy experience no more discomfort during the ragweed season than someone who has a common cold. However, others are more affected by the condition. Assuming that an individual has

a severe impairment of the low back which limits that person to sedentary work, and that the assessment of RFC also restricts him or her from workplaces which involve exposure to ragweed pollen, the implications for adjustment to sedentary work are relatively clear. Ragweed grows outdoors and its pollen is carried in the air, but the overwhelming majority of sedentary jobs are performed indoors. Therefore, with the possible exclusion of some outdoor sedentary occupations which would require exposure to ragweed pollen, the unskilled sedentary occupational base is not significantly compromised. The decisionmaker may need the assistance of a VS in determining the significance of the remaining occupational based of unskilled sedentary work in more difficult cases.

2. *Light exertion combined with a nonexertional impairment.* The major difference between sedentary and light work is that most light jobs – particularly those at the unskilled level of complexity – require a person to be standing or walking most of the workday. Another important difference is that the frequent lifting or carrying of objects weighing up to 10 pounds (which is required for the full range of light work) implies that the worker is able to do occasional bending of the stooping type; i.e., for no more than one-third of the workday to bend the body downward and forward by bending the spine at the waist. Unlike unskilled sedentary work, many unskilled light jobs do not entail fine use of the fingers. Rather, they require gross use of the hands to grasp, hold, and turn objects. Any limitation on

these functional abilities must be considered very carefully to determine its impact on the size of the remaining occupational base of a person who is otherwise found functionally capable of light work.

Where a person has a visual impairment which is not of Listing severity but causes the person to be a hazard to self and others – usually a constriction of visual fields rather than a loss of acuity – the manifestations of tripping over boxes while walking, inability to detect approaching persons or objects, difficulty in walking up and down stairs, etc., will indicate to the decisionmaker that the remaining occupational base is significantly diminished for light work (and medium work as well).

On the other hand, there are nonexertional limitations or restrictions which have very little or no effect on the unskilled light occupational base. Examples are inability to ascend or descend scaffolding, poles, and ropes; inability to crawl on hands and knees; and inability to use the finger tips to sense the temperature or texture of an object. Environmental restrictions, such as the need to avoid exposure to feathers, would also not significantly affect the potential unskilled light occupational base.

Where nonexertional limitations or restrictions within the light work category are between the examples above, a decisionmaker will often require the assistance of a VS.

3. *Medium exertion combined with a nonexertional impairment.* Most medium jobs, like most

light jobs, require the worker to stand or walk most of the time. Also, as in light work, most unskilled medium jobs require gross use of the hands to grasp, hold, and turn objects rather than use of the fingers for fine movements of small object. Medium work is distinct from the less strenuous levels in the activities needed to accomplish the considerable lifting and carrying involved for the full range of medium work. A maximum of 50 pounds may be lifted at a time, with frequent lifting or carrying of objects weighing up to 25 pounds. (Frequent in this context means from one- third to two-thirds of the workday.) Consequently, to perform the full range of medium work as defined, a person must be able to do both frequent stooping and frequent crouching – bending both the back and the legs – in order to move objects from one level to another or to move the objects near foot level. While individual occupation classified as medium work vary in exertional demands from just above the light work requirements to the full range of medium work, any limitation of these functional abilities must be considered very carefully to determine its impact on the size of the remaining occupational base of a person who is otherwise found capable of medium work.

In jobs at the medium level of exertion, there is more likelihood than in light work that each factors as the ability to ascend or descend ladders and scaffolding, kneel, and

crawl will be a part of the work requirement. However, limitations of these activities would not significantly affect the occupational base.

As in light work, inability to use the finger tips to sense the temperature or texture of an object is an example of a nonexertional limitation which would have very little effect on the potential unskilled medium occupational base. The need to avoid environments which contain objects or substances commonly known not to exist in most workplaces would be an obvious example of a restriction which does not significantly affect the medium occupational base.

Where nonexertional limitations or restrictions within the medium work category are between the examples above, a decisionmaker will often require the assistance of a VS.

The Disability Determination or Decision Based on a Combination of Exertional and Nonexertional Impairments

The usual requirements apply for a clear, persuasive, orderly rationale, reflecting the sequential evaluation process. There must be findings of fact and recitation of the evidence which supports each finding (see SSR 82-56, PPS- 81, The Sequential Evaluation Process). Whenever a vocational resource is used and an individual is found to be not disabled, the determination or decision will include (1) citations of examples of occupations/jobs the person can do functionally and vocationally and (2) a

statement of the incidence of such work in the region in which the individual resides or in several regions of the country.

In reaching judgments as to the sufficiency of the remaining exertional job base (approximately 2,500 unskilled medium, light, and sedentary occupations, approximately 1,600 unskilled light and sedentary occupations, and approximately 200 unskilled sedentary occupations), there are three possible situations to consider:

1. Where it is clear that the additional limitation or restriction has very little effect on the exertional occupational base, the conclusion directed by the appropriate rule in Tables No. 1, 2, or 3 would not be affected.

2. Where it is clear that additional limitations or restrictions have significantly eroded the exertional job base set by the exertional limitations alone, the remaining portion of the job base will guide the decision.

3. Where the adjudicator does not have a clear understanding of the effects of additional limitations on the job base, the services of a VS will be necessary.

EFFECTIVE DATE: Final regulations providing the Medical-Vocational Guidelines were published in the *Federal Register* on November 28, 1978, at 43 FR 55349, effective February 26, 1979. They were rewritten to make them easier to understand and were published on August 20, 1980, at 45 FR 55566. The policies in this PPS also became effective as of February 26, 1979.

CROSS-REFERENCES: Program Operations Manual System, Part 4 (Disability Insurance State Manual Procedures), section DI 2388, A.5.b.; SSR 83-10, PPS- 101, Determining Capability to Do Other Work – The Medical-Vocational Rules of Appendix 2 (with a glossary); SSR 83-11, PPS-102, Capability to Do Other Work – The Exertionally Based Medical-Vocational Rules Met; SSR 83-12, PPS-103, Capability to Do Other Work – The Medical-Vocational Rules as a Framework for Evaluating Exertional Limitations Within a Range of Work or Between Ranges of Work; and SSR 83-13, PPS-104, Capability to Do Other Work – The Medical- Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments.

PLAINTIFF'S EXHIBIT B

APPENDIX C

Physical Demands

Physical Demand components, as used within the U.S. Employment Service (USES) Occupational Analysis Program, provide a systematic way of describing the physical activities that an occupation requires of a worker.

Within USES, the assessment of physical demands

- is focused primarily on the physical demands of the job – not the physical capacities of the worker;
- provides the means to combine information about many jobs into composite occupational information;

- permits the matching of workers and jobs based upon the workers' capabilities;
- permits the modification of the physical demands of a job to fit the capabilities of disabled workers.

PHYSICAL DEMAND FACTORS AND DEFINITIONS

The Physical Demands of an occupation are described in relationship to twenty different factors.

I. STRENGTH

This factor is defined by one of five levels: Sedentary, Light, Medium, Heavy, and very Heavy. Most jobs require workers to expend energy to some extent. The amount can be affected by a worker's body position and the frequency of the repetition of a task. For instance, a worker in an awkward crouching position may experience as much difficulty exerting five pounds of force as when exerting thirty pounds at waist height while standing. Further, a worker who continuously lifts, pushes, or pulls 15-pound objects or carries them over long distances may exert as much physical effort as when lifting pushing, pulling, or carrying 30-pound objects over short distances on a frequent basis.

To determine Strength Level, analysts review three elements in the physical demands of a job and condense these three elements into a single rating reported as the overall Strength Level of the occupation. The three elements and their subcomponents are defined below:

a. Body Position

Standing: Remaining on one's feet in an upright position at a work station without moving about.

Walking: Moving about on foot.

Sitting: Remaining in a seated position.

b. Weight/Force

Lifting: Raising or lowering an object from one level to another (includes upward pulling).

Carrying: Transporting an object, usually holding it in the hands or arms or on the shoulder.

Pushing: Exerting force upon an object so that the object moves away from the force (includes slapping, striking, kicking, and treadle actions).

Pulling: Exerting force upon an object so that the object moves toward the force (includes jerking).

c. Controls: Hand-Arm and Foot-Leg

Controls entail use of one or both arms or hands (hand-arm) or one or both feet or legs (foot-leg) to move controls on machinery or equipment. Controls include, but are not limited to, buttons, knobs, pedals, levers, and cranks.

Physical Demand factors other than those listed above may affect the Strength Level rating. Analysts consider these factors when they are present and adjust the overall Strength Level rating accordingly.

Sedentary Work

Sedentary Work involves exerting up to 10 pounds of force occasionally or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs may be defined as Sedentary when walking and standing are required only occasionally and all other Sedentary criteria are met. In Part A of this publication, occupations rated Sedentary have an S in the strength column.

Light Work

Light Work involves exerting up to 20 pounds of force occasionally, or up to 10 pounds of force frequently, or a negligible amount of force constantly to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job/occupation is rated Light Work when it requires: (1) walking or standing to a significant degree; (2) sitting most of the time while pushing or pulling arm or leg controls; or (3) working at a production rate pace while constantly pushing or pulling materials even though the weight of the materials is negligible. (The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.) In Part A of this publication, occupations rated Light have an L in the Strength column.

Medium Work

Medium Work involves exerting 20 to 50 pounds of force occasionally, or 10 to 25 pounds of force frequently, or an amount greater than negligible and up to 10 pounds constantly to move objects. Physical demand requirements are in excess of those for Light Work. In Part A of this publication, occupations rated Medium have an M in the Strength column.

Heavy Work

Heavy Work involves exerting 50 to 100 pounds of force occasionally, or 25 or 50 pounds of force frequently, or 10 to 20 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Medium Work. In Part A of this publication, occupations rated Heavy have an H in the Strength column.

Very Heavy Work

Very Heavy Work involves exerting in excess of 100 pounds of force occasionally, or in excess of 50 pounds of force frequently, or in excess of 20 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Heavy Work. In Part A of this publication, occupations rated Very Heavy have a V in the Strength column.

LIMITS OF WEIGHTS LIFTED/CARRIED OR FORCE EXERTED

Rating	Occasionally	Frequently	Constantly
Sedentary	*–10	*	N/A
Light	*–20	*–10	*
Medium	20–50	10–25	*–10
Heavy	50–100	25–50	10–20
Very Heavy	100 +	50 +	20 +

* = negligible weight: N/A = Not Applicable

In the preceding chart, lifting, pushing, and pulling are expressed in terms of both intensity and duration. Judgments regarding intensity involve consideration of the weight handled, position of the worker's body or the part of the worker's body used in handling weights, and the aid given by helpers or by mechanical equipment. Duration is the total time spent by the worker in carrying out these activities. Carrying most often is expressed in terms of duration, weight carried, and distance carried. This information is summarized in the table on the next page.

The range excludes the lower number and includes the higher number, i.e. the range 10 – 25 excludes 10 (begins at 10 +) and includes 25. Overlapping ranges of * – 10 in the Occasionally column for Sedentary Work and Light Work occupations are differentiated on the basis of the worker's posture and the rate at which work is performed. For example, all Sedentary occupations involve sitting constantly. However, in some occupations workers sit consistently but exert force of an amount or at a frequency rate that exceeds those for Sedentary Work. Such occupations are, therefore, rated at least for Light Work.

ABSENCE OR PRESENCE OF OTHER PHYSICAL DEMAND COMPONENTS

Analysts use the following symbols to indicate the absence or presence (and when present, the frequency of occurrence) of the other nineteen Physical Demand components.

Code	Frequency	Definition
N	Not Present	Activity or condition does not exist.
O	Occasionally	Activity or condition exists up to 1/3 of the time.
F	Frequently	Activity or condition exists from 1/3 to 2/3 of the time.
C	Constantly	Activity or condition exists 2/3 or more of the time.

2. CLIMBING

Ascending or descending ladders, stairs, scaffolding, ramps, poles, and the like, using feet and legs or hands and arms. Body agility is emphasized. In Part A, the rating for the Climbing component appears second in the first Physical Demand column under the vertical heading Cl.

3. BALANCING

Maintaining body equilibrium to prevent falling when walking, standing, crouching, or running on narrow, slippery, or erratically moving surfaces: or maintaining body equilibrium when performing gymnastic feats. In Part A, the rating for the Balancing component appears third in the first Physical Demand column under the vertical heading Ba.

4. STOOPING

Bending body downward and forward by bending spine at the waist, requiring full use of the lower extremities and back muscles. In Part A, the rating for the Stooping component appears fourth in the first Physical Demand column under the vertical heading St.

5. KNEELING

Bending legs at knees to come to rest on knee or knees. In Part A, the rating for the Kneeling component appears fifth in the first Physical Demand column under the vertical heading Kn.

6. CROUCHING

Bending body downward and forward by bending legs and spine. In Part A, the rating for the Crouching component appears sixth in the first Physical Demand column under the vertical heading Co.

7. CRAWLING

Moving about on hands and knees or hands and feet. In Part A, the rating for the Crawling component appears seventh in the first Physical Demand column under the vertical heading Cw.

8. REACHING

Extending hand(s) and arm(s) in any direction. In Part A, the rating for the Reaching component appears eighth in the first Physical Demand column under the vertical heading Re.

9. HANDLING

Seizing, holding, grasping, turning, or otherwise working with hand or hands. Fingers are involved only to the extent that they are an extension of the hand, such as to turn a switch or shift automobile gears. In Part A, the rating for the Handling component appears ninth in the first Physical Demand column under the vertical heading Ha.

10. FINGERING

Picking, pinching, or otherwise working primarily with fingers rather than with the whole hand or arm as in handling. In Part A, the rating for the Fingering component appears tenth (last) in the first Physical Demand column under the vertical heading Fi.

11. FEELING

Perceiving attributes of objects, such as size, shape, temperature, or texture, by touching with skin, particularly that of fingertips. In Part A, the rating for the Feeling component appears first in the second set of Physical Demand ratings under the vertical heading Fe.

12. TALKING

Expressing or exchanging ideas by means of the spoken word to impart oral information to clients or to the public and to convey detailed spoken instructions to other workers accurately, loudly, or quickly. In Part A, the rating for the Talking component appears second in the second set of Physical Demand ratings under the vertical heading Ta.

13. HEARING

Perceiving the nature of sounds by ear. In Part A, the rating for the Hearing component appears third in the second set of Physical Demand ratings under the vertical heading He.

14. TASTING/SMELLING

Distinguishing, with a degree of accuracy, differences or similarities in intensity or quality of flavors or odors, or recognizing particular flavors or odors, using tongue or nose. In Part A, the rating for the Tasting/Smelling component appears fourth in the second set of Physical Demand ratings under the vertical heading TS.

15. NEAR ACUITY

Clarity of vision at 20 inches or less. In Part A, the rating for the Near Acuity component appears fifth in the second set of Physical Demand ratings under the vertical heading NA.

16. FAR ACUITY

Clarity of vision at 20 feet or more. (Note: There is no Physical Demand component for rating clarity of vision in the middle distance of 20 inches to 20 feet.) In Part A, the rating for the Far Acuity component appears sixth in the second set of Physical Demand ratings under the vertical heading FA.

17. DEPTH PERCEPTION

Three-dimensional vision. Ability to judge distances and spatial relationships so as to see objects where and as they actually are. In Part A, the rating for the Depth Perception component appears seventh in the second set of Physical Demand ratings under the vertical heading DP.

18. ACCOMMODATION

Adjustment of lens of eye to bring an object into sharp focus. This factor is required when doing near point work at varying distances from the eye. In Part A, the rating for the Accommodation component appears eighth in the second set of Physical Demand ratings under the vertical heading Ac.

19. COLOR VISION

Ability to identify and distinguish colors. In Part A, the rating for the Color Vision component appears ninth in the second set of Physical Demand ratings under the vertical heading CV.

20. FIELD OF VISION

Observing an area that can be seen up and down or to right or left while eyes are fixed on a given point. In Part A, the rating for the Field of Vision component appears last in the second set of Physical Demand ratings under the vertical heading FV.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY,
Plaintiff,
v.
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant.

Civil No. 94-6357-JO

OPINION AND ORDER

(Filed May 1, 1995)

Ralph Wilborn
1580 Valley River Drive, Suite 170
Eugene, OR 97401

Attorney for Plaintiff

Kristine Olson
United States Attorney
District of Oregon
Craig J. Casey
Assistant United States Attorney
UNITED STATES ATTORNEY'S OFFICE
888 S.W. Fifth Avenue, Suite 1000
Portland, OR 97204-2024

Richard Wetmore
DEPARTMENT OF HEALTH & HUMAN SERVICES
Region X
2201 Sixth Avenue, M/S Rx-10
Seattle, WA 98121

Attorneys for Defendant

JONES, Judge:

Claimant Sandra Forney seeks judicial review of a final decision of the Secretary of Health and Human Services denying her application for supplemental security income benefits ("SSI") under the Social Security Act.

This Court has jurisdiction to review the Secretary's decision pursuant to 42 U.S.C. § 405(g). Following a careful review of the record, this court concludes that the Secretary's decision is not supported by substantial evidence and must be remanded.

ADMINISTRATIVE HISTORY

Claimant applied for SSI on November 18, 1991, and was initially denied benefits on February 10, 1992. The denial was affirmed on reconsideration. On March 15, 1993, a hearing was held before an Administrative Law Judge ("ALJ"). The ALJ found that claimant was not disabled, and denied her benefits. The Appeals Council granted claimant's request for review and remanded the claim to the ALJ on July 30, 1993.

After the second hearing on April 18, 1994, the ALJ again denied claimant's application for SSI. After the Appeals Council denied review, the ALJ's denial of benefits became the final decision of the Secretary.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence on the record as a whole. "Substantial evidence is such relevant evidence as

a reasonable mind might accept as adequate to support a conclusion." *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusion." *Martinez v. Heckler*, 807 F.2d 771, 772 (9th Cir. 1986). The Secretary's decision must be upheld if it is a rational interpretation of the evidence, even if there are other possible rational interpretations. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).

SUMMARY OF FACTS

At the time of the first hearing, claimant was 46 years old. Claimant attended high school through the tenth grade and later attained her GED in 1977. Her past work history includes positions as a cook, baker, and kitchen manager for a school.

Dr. Cross, claimant's treating physician, first diagnosed the possibility of fibromyalgia on August 11, 1988. Claimant showed signs of improvement and control over the fibromyalgia from the first diagnosis until July 26, 1991. Thereafter, her condition degenerated and Dr. Cross advised her to stop working because of the pain generated by the fibromyalgia.

Upon the advice of her treating physician, claimant quit her job. Claimant alleges that she is disabled due to the fibromyalgia, also known as fibrositis, and low grade depression stemming from her condition.

On November 18, 1991, claimant applied for SSI benefits. Claimant was examined by Dr. William Dudley as part of the disability determination process. Dr. Dudley

concluded that claimant's condition did not preclude all work. Based on Dr. Dudley's findings, the Secretary denied benefits.

On reconsideration, the Secretary again denied claimant's request for disability benefits, based on reports by Dr. Cross and by a clinical psychologist, Dr. Greenough, Ph.D. In his report, Dr. Cross advised that claimant is restricted to a maximum of 15 minutes of standing and 20 minutes of walking. He also limited claimant from lifting more than 15 pounds, or carrying that weight for more than 30 feet. Dr. Cross further concluded that claimant could work for only two hours during an eight hour day. Dr. Greenough diagnosed claimant with adjustment disorder with depression and characteristics of a dependent personality disorder.

At the hearing on January 13, 1993, a psychologist, Dr. Isabelle Moser, Ph.D., and a vocational expert testified as impartial experts. Both concluded from the evidence presented at the hearing that claimant is capable of working with moderate limitations. The vocational expert further testified that claimant cannot return to her past relevant work.

Claimant testified that she lives with her husband in an apartment. She exercises by walking two miles a day and by participating in water aerobics. For social activities, claimant visits with her family. Although claimant is able to do light housekeeping and grocery shopping, her husband performs the heavy work such as major grocery shopping and carrying laundry.

The ALJ concluded that claimant is not disabled and has the residual functional capacity to perform work that

does not involve lifting more than 15 to 20 pounds or walking more than two miles, and that allows her to stand and change position at will. The ALJ doubted claimant's credibility as to the degree of pain she currently suffers.

After claimant appealed the ALJ's decision, the Appeals Council remanded the case for another hearing based upon its conclusion that the evidence did not support the ALJ's assessment of the claimant's residual functional capacity. On remand, the ALJ was instructed to obtain a consultative general medical examination.

The hearing on remand was held on March 15, 1994. Before the hearing, Dr. Nancy Brennan, D.O., examined claimant at the request of Disability Determination Services. Dr. Brennan's assessment of claimant's fibromyalgia was consistent with Dr. Cross's assessment. Both limit claimant's lifting capacity to 15 pounds, and standing or walking to 15-20 minutes without interruption. Dr. Brennan also determined that claimant could sit for six hours without interruption. Dr. Brennan further limited claimant from kneeling, balancing, crouching, or crawling, and from lifting, carrying, reaching over her head, or handling objects heavier than a pound or two for any length of time. Dr. Brennan also noted that claimant should limit activities requiring reaching, pushing, and pulling. Dr. Brennan advised that claimant should avoid surroundings that cause external stress to her system. Finally, Dr. Brennan reported that claimant demonstrates a lapse of concentration and memory.

Claimant, her husband, Dr. Peter Moulton, Ph.D., and a vocational expert testified at the remand hearing.

Claimant's testimony was substantially the same as in the first hearing, but she added that she had difficulty concentrating due to her pain. Her husband confirmed that testimony.

Dr. Moulton testified that claimant has a moderate limitation on daily activities, a slight limitation on social functioning, a high limitation in concentration, persistence or pace, and no limitation of deterioration or decompensation. He further testified that although claimant's impairments seriously limit her ability to function, they do not preclude work. Dr. Moulton also testified that claimant has an adjustment disorder brought on by pain from the fibromyalgia.

Although new evidence was presented at the second hearing, the vocational expert's testimony remained the same. The ALJ posed a hypothetical based on the reports of Dr. Brennan and Dr. Moulton, The vocational expert identified several jobs claimant could perform, such as telephone answering service operator and order clerk.

SUMMARY OF THE ALJ'S FINDINGS

The ALJ employed a five-step "sequential evaluation" process in evaluating claimant's disability.[1] The first step of the process requires the ALJ to determine whether claimant has been engaged in substantial gainful activity since her alleged onset of disability. Applying this criteria, the ALJ found that claimant's unsuccessful attempt to

---

[1] 20 C.F.R. § 416.920(a).

work after the onset of her disability was not substantial gainful activity.

Second, the ALJ must determine whether claimant has "severe" impairments which could impose more than a minimal limitation on the claimant's ability to perform basic work activities. Here, the ALJ found claimant to have "severe" impairments.

Third, the ALJ determined that claimant's impairments do not meet or equal any criteria in the Listing of Impairments of the musculoskeletal system because claimant did not provide appropriate physiological or psychological findings according to the listing requirements.

In the fourth step, the ALJ determine that claimant's impairments and consequent limitations prevented her from returning to her past relevant work as a baker, kitchen manager, or cook.

Last, the ALJ applied the Medical-Vocational Guidelines and determined that claimant retained the residual functional capacity for a modified range of light or sedentary unskilled work. Accordingly, the ALJ concluded that claimant is not under a "disability" as defined in the Social Security Act.

DISCUSSION

Claimant advances four arguments challenging the ALJ's findings. Claimant first argues that the ALJ failed to set forth specific and legitimate reasons for rejecting Dr. Cross's findings. Claimant next argues that the ALJ's failure to make specific findings concerning the lack of

credibility in her testimony is reversible error. Third, claimant asserts that the vocational expert's testimony was based on a hypothetical that did not include all of her limitations as described by her treating physician. Finally, claimant argues that the vocational expert's testimony is directly contrary to the *Dictionary of Occupational Titles* and *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles.*

DISCUSSION

I. The ALJ Properly Based His Conclusion on the Evidence Presented.

In disability cases, the treating physician's opinion is given deference because the treating physician " 'is employed to cure and has a greater opportunity to know and observe the patient as an individual.' " *Magallanes,* 881 F.2d at 751. A treating physician's opinion is not, however, necessarily conclusive "as to either a physical condition or the ultimate issue of disability." *Id.* Indeed, "[t]he ALJ may disregard the treating physician's opinion whether or not that opinion is contradicted." *Id.* This is particularly true where the opinion is " 'brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion.' " *Id.* (citation omitted).

To reject the opinion of a treating physician, the ALJ must make findings setting forth specific, legitimate reasons that are based on substantial evidence in the record. " 'The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.' " *Magallanes,* 881 F.2d at 751, *quoting Cotton*

v. Bowen, 799 F.2d 1403, 1408 (9th Cir. 1986); *see also Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987).

Claimant testified that she is active for more than two hours a day on a regular basis. That testimony directly contradicted Dr. Cross's report that claimant could work no more than two hours a day. Because of claimant's contradictory testimony, the ALJ rejected Dr. Cross's opinion. The ALJ did not err in rejecting Dr. Cross's report on that basis.

II. The ALJ's Finding that Claimant Lacked Credibility is Substantiated by the Evidence.

Credibility determinations ordinarily are within the province of the ALJ. *See Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). However, "once the claimant produces objective medical evidence of an underlying impairment, and adjudicator may not reject a claimant's subjective complaints based solely on a lack of objective evidence to fully corroborate the alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). Nonetheless, "an adjudicator may find the claimant's allegations of severity to be not credible [provided that] the adjudicator * * * specifically makes[s] findings which support this conclusion." *Id.* In his findings, the ALJ noted that claimant's testimony was incongruous to her alleged pain:

> She was capable of attention to all questions asked, and her responses were rational, although somewhat evasive. . . . [S]he no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony.

The above reasons constitute specific findings and are sufficient to support the ALJ's conclusion that claimant's allegations of back pain were not credible.

III. The ALJ's Hypothetical Questions were not Improper.

The ALJ's hypothetical questions incorporated all of claimant's relevant limitations as presented by Dr. Brennan and Dr. Moulton. As stated above, the ALJ disregarded Dr. Cross's report because of claimant's contradictory testimony. The ALJ was not, therefore, required to incorporate Dr. Cross's findings in the questions posed to the vocational expert. The ALJ's hypothetical questions were not improper.

IV. The Vocational Expert's Testimony is Contrary to Dr. Brennan's Report.

Because claimant proved that her condition prevents a return to her previous occupation, the Secretary has the burden to show that the claimant can engage in substantial gainful work in the economy. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993) (citing *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984)).

Although Dr. Brennan reported that claimant's ability to reach is impaired, the occupations identified by the vocational expert require frequent or constant reaching.

The ALJ did not reject Dr. Brennan's assessment that claimant's ability to reach is impaired. Consequently, the ALJ's conclusion that claimant was capable of performing other substantial gainful activity was not supported by substantial evidence because he only considered occupations which require movement beyond claimant's limitations. Accordingly, the Secretary has not sustained her burden of showing that claimant can engage in substantial gainful work in the economy, and the case must be remanded.

CONCLUSION

Based on a review of the record, the Secretary did not sustain her burden of proof in step five of the five-step evaluative process in determining whether claimant is entitled to benefits. IT IS ORDERED that this case be REMANDED to the Secretary for further proceedings in accordance with this opinion.

DATED this 28th day of April, 1995.

/s/ Robert E. Jones
ROBERT E. JONES
United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff(s), v. SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant(s).	)	Civil No. 94-6357-JO JUDGMENT (Filed May 24, 1995)

Based on the record,

IT IS ORDERED AND ADJUDGED that this case be remanded to the Secretary for further proceedings.

DATED: May 24, 1995

/s/ Robert E. Jones
ROBERT E. JONES,
U.S. DISTRICT JUDGE

JUDGMENT

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANDRA K. FORNEY, Plaintiff-Appellant, v SHIRLEY S. CHATER, Secretary, Commissioner, Social Security Administration, Defendant-Appellee.	CA No. 96-35560 DC No. CV-94-06357 ORDER (Filed Oct. 21, 1996)

In addition to their other arguments, the parties should be prepared to address at oral argument the question whether the decision of the district court is sufficiently final to give this court jurisdiction over the appeal. *Compare Gilchrist v. Schwiker*, 645 F.2d 818, 819 (9th Cir. 1981), and *Copeland v. Bowen*, 861 F.2d 536, 538-39 (9th Cir. 1988), *with Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983).

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By /s/ Illegible
Deputy Clerk

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDRA K. FORNEY, *Plaintiff-Appellant,* v. SHIRLEY S. CHATER, Secretary, Commissioner, Social Security Administration, *Defendant-Appellee.*	No. 95-35560 D.C. No. CV-94-06357-REJ OPINION

Appeal from the United States District Court
For the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
November 8, 1996 – Portland, Oregon

Filed March 4, 1997

Before: William C. Canby, Jr., Pamela Ann Rymer, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Canby

COUNSEL

Ralph Wilborn, Ralph Wilborn and Etta L. Wilborn, Eugene, Oregon, for the plaintiff-appellant.

Kathryn A. Warma, Assistant Regional Counsel, Social Security Administration, Seattle, Washington, for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

Sandra K. Forney appeals the district court's order that remanded to the Administrative Law Judge ("ALJ") Forney's application for disability benefits under the Social Security Act. A threshold issue is whether Forney, who has prevailed in district court to the extent of winning a remand pursuant to sentence four of 42 U.S.C. § 405(g), may now appeal the district court's ruling to this court. We conclude that she may not, and accordingly dismiss the appeal.

I. Facts

Forney applied for disability benefits in 1991. Her application was denied and she requested a hearing. An administrative law judge (ALJ) held a hearing and denied benefits. The ALJ's decision was reviewed by the Appeals Council, which remanded the matter to the ALJ for a further hearing. The ALJ again denied the claim, and this time the Appeals Council denied review.

Forney then sought review in district court, pursuant to 42 U.S.C. § 405(g). The district court ruled on four of Forney's contentions. First, it held that the ALJ did not err in rejecting the testimony of Forney's treating physician, because it conflicted with Forney's own testimony. Second, the district court upheld the ALJ's discrediting of

Forney's testimony regarding the severity of her pain; the district court stated that the ALJ made specific findings regarding Forney's courtroom appearance and testimony that were sufficient to support the finding. Third, the court held that the hypothetical questions posed to the vocational expert included all of Forney's relevant physical limitations, in light of the permissible disregard of the testimony of her treating physician. Fourth and last, the district court ruled that the vocational expert incorrectly selected as employment available to Forney several occupations that required frequent or constant reaching, when the credited expert testimony was that Forney's capacity to reach was impaired. In consequence of this last ruling, the district court held that the Secretary had failed to sustain her burden of showing that Forney, who could no longer perform her previous work, can engage in substantial work in the economy. The district court then remanded the matter to the Secretary for further proceedings, which will presumably include further inquiry into whether there are any occupations that Forney, with her impaired reaching ability, can engage in.

II. Appealability

Forney now appeals, seeking to challenge the district court's first three rulings. The threshold issue is whether Forney may appeal at this time when the district court has ordered a remand under sentence four of § 405(g) that may result in an award of all benefits she claimed. We conclude that she may not.

A few years ago, before the Supreme Court's most recent pronouncements dealing with such remands, we

would have said that the district court's decision was not "final," within the meaning of 28 U.S.C. § 1291, insofar as Forney is concerned. We so held in a similar situation in *Gilcrist v. Schweiker*, 645 F.2d 818, 819 (9th Cir. 1981). In *Gilcrist*, an ALJ had rejected a claim of disability from back pain, in part because the allegations of pain were inconsistent with the ALJ's personal observation of the claimant. The district court remanded the matter to the Secretary for reconsideration in light of the extensive medical history of Gilchrist's efforts to secure relief from pain. We held that this remand "does no more than order clarification of the administrative decision," and provided nothing final for us to review. *Id.* at 819.

Gilcrist was distinguishable from another line of our cases, in which we permitted the *Secretary* to appeal from an order of the district court deciding a separable legal issue and remanding the matter to the administrative agency for further proceedings. The leading example is *Stone v. Heckler*, 722 F.2d 464, 466-68 (9th Cir. 1983). In *Stone*, an ALJ had applied the Secretary's medical-vocational guidelines to find no disability. On review, the district court held that the ALJ could not rely on those guidelines, but would have to make specific factual findings on jobs that the claimant could perform. *Stone*, 722 F.2d at 467. The Secretary appealed, arguing that the district court had applied an improper legal standard that would govern further proceedings and should be subject to immediate appellate review. We held that the district court's decision was "final" and appealable by the Secretary, stating:

> The district court's decision is adverse to the Secretary and, if wrong, would result in a totally wasted proceeding below, from which the Secretary may not be able to appeal. Deciding this legal issue now will promote the least possible waste of judicial resources.

Id. We recognized that numerous other courts, in deciding whether remand orders were appealable, had "especially considered whether a holding of nonappealability would effectively deprive the litigants of an opportunity to obtain review." *Id.*

We have followed *Stone* in other cases where the Secretary or similar administrative official sought to appeal orders remanding for administrative proceedings that would be governed by a separable, arguably incorrect, legal standard incorporated in the remand decision. *See Regents of the Univ. of Calif. v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985) (amended opinion) (Secretary of Health and Human Services may appeal adverse decision remanding for further administrative proceedings; *Kaho v. Ilchert*, 765 F.2d 877, 880-81 (9th Cir. 1985)) (District Director of INS may appeal remand order). The key to all of these decisions is that, if no appeal of the remand order were permitted, the Secretary might later be precluded from any appeal. The principle was best explained in *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990). In *Chugach*, we permitted the Secretary of the Interior to appeal a district court decision interpreting the Alaska Native Claims Settlement Act and remanding an affected Native group's boundary dispute to the Interior Board of Land Appeals. In explaining why we would review the statutory interpretation prior to the remand, we said:

> [F]ailing to permit immediate appeal might foreclose review altogether. Should the Secretary lose on remand, there would be no appeal, for the Secretary cannot appeal his own agency's determinations.

Id.; see also United States v. Louisiana-Pacific Corp., 846 F.2d 43, 45 (9th Cir. 1988) (declining to permit United States to appeal remand order when it would have means of securing later review; distinguishing *Stone* where, after remand, "the Secretary would have no right to appeal").

These considerations do not apply, of course, to Forney. If she is denied benefits on remand, nothing prevents her from seeking review of the denial. Moreover, she may prevail in the administrative proceedings on remand and obtain complete relief. Accordingly, we would have been inclined, under our prior analysis, to hold that the district court's remand decision was not "final" as to Forney.

In recent years, however, the Supreme Court has spoken in terms that necessarily modify our former approach to "finality" of remand decisions. In *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), the Court permitted the Secretary to appeal as final a decision remanding a Social Security disability claim for further administrative proceedings. As in our cases just discussed, the Court pointed out that, "should the Secretary on remand undertake the inquiry mandated by the District Court and award benefits, there would be grave doubt, as the Court of Appeals recognized, whether he could appeal his own order." *Id.* at 625.

In discussing the question of finality of district court decisions under § 405(g), however, the Court made clear

that decisions by a district court remanding under the fourth sentence of § 405(g) ended the civil action brought to review the Secretary's initial decision.[1] "The use of the term 'a civil action' suggests that at least in the context of § 405(g), each final decision of the Secretary will be reviewable by a separate piece of litigation." *Id.* at 624-25. The fourth sentence of § 405(g) authorizes the district court "to enter 'a *judgment* affirming, modifying, or reversing the decision of the Secretary, *with or without remanding the cause for a rehearing.*' " *Id.* at 625 (quoting 405(g) (emphasis by the Supreme Court)). Thus, according to the Supreme Court:

> The District Court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue.

Id. In light of this comment that the remand order terminates the civil action, we cannot very well conclude that

---

[1] Remands are also authorized by the sixth sentence of § 405(g), and those remands do not necessarily terminate the civil action. The sixth sentence authorizes remands only when the Commissioner so moves before filing an answer, or when there is a showing of new material evidence and good cause for not earlier placing it in the record. Neither of these conditions is met in the present case. Forney's remand order therefore falls under the fourth sentence of 405(g). *See Finkelstein*, 496 U.S. at 626; *Shalala v. Schaefer*, 113 S.Ct. 2625, 2629 & n.2 (1993).

the decision in our case is not final for Forney as well as for the Commissioner.[2]

The fact remains, however, that Forney possibly may obtain all of the relief she seeks in the administrative proceedings on remand. The considerations of judicial economy that, before *Finkelstein*, led us to hold remands generally non-final are still present. There is a temptation, accordingly, to resist the conclusion that *Finkelstein* makes a sentence-four remand final for the claimant as well as the Secretary. After all, the Court in *Finkelstein* stated that it was not making a rule for all remands: "There is, of course, a great variety of remands, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges." *Id.* at 623 (footnote omitted). The Court was only ruling on "whether orders of the type entered by the district court are immediately appealable *by the Secretary.*" *Id.* And all but one[3] of the published decisions of the courts of appeals applying *Finkelstein* involve instances in which the Secretary or comparable agency official is allowed to appeal because, if the remand results in victory for the claimant, the Secretary will be unable to appeal. *See, e.g., St. Francis Medical Ctr. v. Sullivan*, 962 F.2d 1110, 1114 (3d Cir. 1992); *Colvin v. Sullivan*, 939 F.2d 153, 155 (4th Cir. 1991); *Travis v. Sullivan*, 985 F.2d 919, 922-23 (7th Cir. 1993); *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1009 (10th Cir. 1996).

[2] It makes no difference that the district court, in remanding, purported not to enter a judgment. The sentence-four remand order *is* a final judgment, whether or not denominated as such. *Shalala*, 113 S.Ct. at 2632 & n.6.

[3] For the one exception, see note 6, *infra*.

In the end, however, it is apparent that to conclude that a sentence-four remand is not final for the claimant is analytically untidy; it is flatly inconsistent with the Supreme Court's insistence in *Finkelstein* that a sentence-four remand terminates the civil action. Indeed, it is error for the district court to attempt to retain jurisdiction upon making a sentence-four remand. *See Shalala*, 113 S.Ct. at 2630. Thus the Fifth Circuit has interpreted *Finkelstein* to preclude a claimant who has been denied benefits administratively after a sentence-four remand from reinstating her district court action to secure further review. *Frizzell v. Sullivan*, 937 F.2d 254, 256-57 (5th Cir. 1991). In order to contest the post-remand denial of benefits, the claimant must institute a new action. *See id.* at 255. The civil action ending in a sentence-four remand, therefore, must be "final," in a formalistic sense, for all parties to it.[4]

That fact, however, does not necessarily entitle Forney to appeal the district court's decision. A prevailing party normally may not appeal the decision in its favor. *See Electrical Fittings Corp. v. Thomas & Betts Corp.*, 307 U.S. 241, 242 (1939) ("A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining review of findings he deems erroneous which

[4] Although the language of § 405(g) and *Finkelstein*, 496 U.S. at 624-25, clearly support the notion that a claimant who has secured a sentence-four remand and then been denied benefits must bring a new action to contest the denial, the advantages of such a system do not spring readily to mind.

are not necessary to support the decree"); *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994) (following *Electrical Fittings*). There can be little doubt that a claimant "prevails" in the view of the Supreme Court when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed.[5] The Court so held for purposes of attorney's fee awards in *Shalala*, 113 S.Ct. at 2631.

It is true that the status of prevailing party for purposes of attorney's fees under 28 U.S.C. § 2412(d)(1)(B) does not automatically equate with status as prevailing party for purposes of appeal. There are compelling reasons, however, for declining to permit a claimant in Forney's position from appealing the remand order she succeeded in obtaining. They are the same reasons that underlay the long-established general rule that a remand to an administrative agency was not appealable, with an exception only for the Secretary who might be precluded from post-remand access to the court. *See, e.g., Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247 (Fed.Cir. 1992). Forney may, on remand, secure all of the relief she seeks. If she

[5] As the Supreme Court recognized in *Finkelstein*, there may be instances when a claimant is foreclosed by the district court's remand decision from part of the benefits sought, and would then seek an appeal from the remand decision on the ground that broader relief should have been awarded. *See Finkelstein*, 496 U.S. at 623 n.3. Like the Supreme Court, we express no opinion on the right of the claimant to immediate appeal in that situation. *See id.* Implicit in this disclaimer, however, is the proposition that when the remand order does *not* foreclose the possibility of the claimant's obtaining all of the relief sought, it is not appealable by the prevailing claimant.

does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record. *See Travelstead*, 978 F.2d at 1247. All of these considerations lead us to conclude that we ought not to entertain Forney's present appeal.[6]

Forney argues, however, that our analysis leaves her in considerable danger. She is the prevailing party in her civil action that resulted in a remand. Yet on some of the issues she urged, the district court ruled against her. If she is denied benefits on remand, she must seek review by commencing a new civil action. *See Finkelstein*, 496 U.S. at 625 ("each final decision of the Secretary will be reviewable by a separate piece of litigation"); *Frizzell*, 937

[6] We do not follow, therefore, the example of the Tenth Circuit in *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994). There the court of appeals permitted a claimant to appeal a sentence-four remand order, stating in a footnote that such remand orders were "final and appealable" under *Finkelstein*. *Id.* at 1402 n.2. We have found no other published decision permitting appeal of such a remand order by a claimant. The outcome of the claimant's appeal was most unusual; the remand order, which had been invited by the Secretary, was held to be improper and the Secretary's denial of benefits was ordered reinstated. *Id.* at 1403-04. Thus the only party that appealed, the claimant, was left worse off for having appealed. We conclude that this scenario is unlikely to be repeated, and that appeal of a remand order by a claimant normally will leave further administrative proceedings to follow regardless of the outcome of the appeal. For that reason, judicial economy militates against permitting the prevailing claimant to appeal.

F.2d at 255. In that new action, she contends, she is likely to be foreclosed by principles of res judicata, collateral estoppel, or even *stare decisis* from contesting the court's adverse rulings in the prior action. Thus, she contends, she must be allowed to appeal those issues now or forever lose her right to contest them.

Although Forney's argument has some initial appeal, her dilemma is a false one. It is not surprising or unfair that, should Forney return to district court after being denied benefits on remand, the district court likely will adhere to its prior rulings. Even if the district court's remand had not been final, as *Finkelstein* requires it to be, the district court presumably would adhere to the law of the case and not reexamine its earlier rulings. The crucial question for Forney arises when she appeals to this court the adverse decision of the district court in her new civil action. Will she be foreclosed by principles of res judicata or collateral estoppel from litigating the issues decided against her in her first, final civil action, in which she "prevailed"?

The answer is "no." In the first place, it is inappropriate to hold Forney to rulings that she was precluded from appealing. In *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983), we upheld a district court's refusal to hold the government collaterally estopped by an interlocutory ruling that it could not have appealed. *See also United States v. Weems*, 49 F.3d 528, 533 (9th Cir. 1995) (principle that government should not be bound by ruling it could not appeal inapplicable when opposing party appealed and government was able to litigate issue on cross-appeal).

Second, collateral estoppel applies only to rulings that were essential to the judgment in the prior case. *Id.* at 532. The judgment that Forney has just secured is a sentence-four remand to the Secretary. The district court's rulings against Forney on the issues of rejection of physician's testimony, discrediting of Forney's pain testimony, and inclusion of Forney's physical limitations in the expert's hypothetical questions, were all unnecessary to the remand. The remand was based solely on the error of the vocational expert in testifying that Forney could perform occupations requiring frequent or constant reaching. Thus Forney's case falls squarely within the *Restatement* example that we quoted approvingly in *Weems*, 49 F.3d at 533:

> A, as owner of a trademark, brings an action against B for infringement. B denies the validity of the trademark and denies infringement. The court finds that the trademark is valid, but that B had not infringed it, and gives judgment for B. Thereafter A brings an action against B alleging that since the rendition of judgment B infringed the trademark. B is not precluded from defending this action on the ground that the trademark is invalid.

Restatement Second of Judgments, § 27, comment h, Illustration 14, "Determinations Not Essential to Judgment" (1982). Thus Forney will not be bound in a future appeal by the adverse rulings that we do not permit her to appeal today.

III. Conclusion

Forney prevailed in district court by securing a remand to the Secretary pursuant to sentence four of 42 U.S.C. § 405(g). The remand order terminated her civil action favorably to her, and she is the prevailing party. As a prevailing party, she cannot appeal the remand order. Accordingly, Forney's appeal is

DISMISSED.

Supreme Court of the United States

No. 97-5737

Sandra K. Forney,

Petitioner

v.

Kenneth S. Apfel,
Commissioner of Social Security

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 27, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 27, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 13, 1998. Rule 29.2 does not apply.

January 16, 1998

Wed 4/22 #2

No. 97-5737

(6)

Supreme Court, U.S.
FILED
FEB 24 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

SANDRA K. FORNEY,

Petitioner,

vs.

KENNETH S. APFEL, Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

RALPH WILBORN
(Counsel of Record for Petitioner)
RALPH WILBORN AND
ETTA L. WILBORN, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
(541) 485-4265

ETTA L. WILBORN
TIM WILBORN
RALPH WILBORN AND
ETTA L. WILBORN, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
(541) 485-4265

ERIC SCHNAUFER
2501 N. Lincoln Ave., #285
Chicago, Illinois 60614
(773) 935-4016

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

QUESTION PRESENTED FOR REVIEW

The question presented is whether a district court judgment, which reverses a final decision of the Commissioner of Social Security with a remand for a rehearing, pursuant to the fourth sentence of 42 U.S.C. § 405(g), is immediately appealable by the Social Security claimant who, despite being a "prevailing party," nevertheless is aggrieved by that judgment in that she sought broader relief than the district court awarded?

STATEMENT REGARDING SUPREME COURT RULE 24(b)

All parties to the proceeding in the court whose judgment is under review (*i.e.*, the United States Court of Appeals for the Ninth Circuit) are listed in the caption of this case. However, President Clinton appointed Kenneth S. Apfel to serve as commissioner of the Social Security Administration, to succeed Shirley S. Chater. Therefore, pursuant to Rule 43(c) of the Federal Rules of Appellate Procedure and Supreme Court Rule 35.3, Kenneth S. Apfel is substituted for Shirley S. Chater as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 42 U.S.C. § 405(g).

TABLE OF CONTENTS

Page

Question Presented For Review i

Statement Regarding Supreme Court Rule 24(b) ii

Table Of Contents iii

Opinions Below 1

Grounds For Jurisdiction 1

Statutes And Regulations Involved In This Case ... 2

Statement Of The Case 5

Summary Of Argument 10

Argument 11

28 U.S.C. § 1291 Confers Jurisdiction On The Appellate Courts To Review All Final Decisions Of The District Courts 11

A Judgment Entered Pursuant To The Fourth Sentence Of 42 U.S.C. § 405(g) Is A Final Decision, Subject To Appeal Under 28 U.S.C. § 1291 12

In the Fourth Sentence of 42 U.S.C. § 405(g), Congress Granted Broad Judicial Authority 15

The Right To Appeal Turns Not On Which Party Prevails, But On Which Party Was (Or Parties Were) *Aggrieved* 17

An Appeal At This Stage Of The Proceedings Will Not Be A "Piecemeal" Appeal 19

The Circuit Courts Of Appeals Have Allowed Claimants In Petitioner's Position To Appeal 29

Conclusion 30

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Shalala, 837 F.Supp. 318 (D. Or. 1993), *as modified by Atkins v. Shalala*, 70 F.3d 529 (9th Cir. 1995) 29, 30

Bilby v. Schweiker, 762 F.2d 716 (9th Cir. 1985) 7

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 20, 21, 29

Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986) 22, 23

Catlin v. United States, 324 U.S. 229 (1945) 23, 25

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) 18, 19

Fife v. Heckler, 767 F.2d 1427 (9th Cir. 1985) 7

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 25, 26

Flanagan v. United States, 465 U.S. 259 (1984) 27

Forney v. Chater, 108 F.3d 228 (9th Cir. 1997) ..... *passim*

Frizzell v. Sullivan, 937 F.2d 254 (5th Cir. 1991) 13

Gilliland v. Heckler, 786 F.2d 178 (3d Cir. 1986) 7

Heckler v. Campbell, 461 U.S. 458 (1983) 8

Jenkins v. Sullivan, 906 F.2d 107 (4th Cir. 1990) 7

Lester v. Chater, 81 F.3d 821 (9th Cir. 1995) 7

Melkonyan v. Sullivan, 501 U.S. 89 (1991) 12

Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 25

TABLE OF AUTHORITIES – Continued

Page

Nguyen v. Shalala, 43 F.3d 1400 (10th Cir. 1994) 21, 29, 30

Perales v. Sullivan, 948 F.2d 1348 (2d Cir. 1991) .. 21, 26, 27

Pitzer v. Sullivan, 908 F.2d 502 (9th Cir. 1990) 7

Ramirez v. Shalala, 8 F.3d 1449 (9th Cir. 1993) 7

Richmond v. Chater, 94 F.3d 263 (7th Cir. 1996) 29

Rivera v. Sullivan, 923 F.2d 964 (2d Cir. 1991) 7

Shalala v. Schaefer, 509 U.S. 292 (1993) 13, 20, 30

Sprague v. Bowen, 812 F.2d 1226 (9th Cir. 1987) 7

Sullivan v. Finkelstein, 496 U.S. 617 (1990) ..... *passim*

Sullivan v. Hudson, 490 U.S. 877 (1989) 16, 17

Thompson v. Sullivan, 957 F.2d 611 (8th Cir. 1992) 8

Travelstead v. Derwinski, 978 F.2d 1244 (Fed. Cir. 1992) 21, 22, 23, 24, 27

United States v. Jose, 117 S.Ct. 463 (1996) .. 8, 17, 18, 30

Varney v. Secretary of HHS, 859 F.2d 1396 (9th Cir. 1988) 7, 28

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 2412(d)(1)(B) 19

42 U.S.C. § 405(g) ..... *passim*

42 U.S.C. § 423 5

42 U.S.C. § 1383(c)(3) 5

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

20 C.F.R. § 404.981 1

20 C.F.R. § 404.1520(f) 8

RULES

Fed.R.App.P. 43(c) i

Supreme Court Rule 13.3 1

Supreme Court Rule 29.2 1

Supreme Court Rule 30.1 1

Supreme Court Rule 35.3 i

OTHER

Employment and Training Admin., U.S. Dep't of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991) 8

20 *Moore's Federal Practice* § 303.10 [2] [a] (3d ed. 1997) 18

OPINIONS BELOW

The agency's unpublished final decision, an April 18, 1994 administrative law judge (ALJ) decision, appears at pages 7-33 of the Joint Appendix.[1]

The district court's unpublished OPINION AND ORDER entered May 2, 1995, and its unpublished JUDGMENT entered May 25, 1995, appear at pages 118-28 and 129, respectively, of the Joint Appendix. The Ninth Circuit's OPINION, filed March 4, 1997 (see Joint Appendix pages 131-44), is published as *Forney v. Chater*, 108 F.3d 228 (9th Cir. 1997). This Court granted Petitioner's Petition for a Writ of Certiorari, on January 16, 1998. (Joint Appendix at 145.)

GROUNDS FOR JURISDICTION

The published OPINION of the U.S. Court of Appeals for the Ninth Circuit was entered March 4, 1997. (Joint Appendix at 131.) Petitioner's petition for rehearing was denied by Order filed May 29, 1997. The Petition for a Writ of Certiorari was filed within 90 days of the denial of the petition for rehearing and was timely under Supreme Court Rules 13.3, 29.2, and 30.1.

---

[1] In accordance with 20 C.F.R. § 404.981 (1997), the ALJ's decision became the agency's final order when the Appeals Council of the Social Security Administration declined to review the ALJ's decision.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The following statutes, 28 U.S.C. § 1291, and 42 U.S.C. § 405(g) are at issue in the instant appeal:

42 U.S.C. § 405(g) Judicial review.

[1] Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] **The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a**

rehearing. [5] The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable

> only to the extent provided for review of the original findings of fact and decision. [8] **The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.** [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

42 U.S.C. § 405(g) (bold emphases and bracketed numbering added).

> **28 U.S.C. § 1291. Final decisions of district courts.**
>
> **The courts of appeals** (other than the United States Court of Appeals for the Federal Circuit) **shall have jurisdiction of appeals from all final decisions of the district courts of the United States**, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291 (bold emphases added).

STATEMENT OF THE CASE

Petitioner applied for Social Security disability insurance benefits, under Title II of the Social Security Act[2], 42 U.S.C. § 423, in 1991. Her application was denied and she requested a hearing. An administrative law judge held a hearing and denied benefits. The ALJ's decision was reviewed by the Appeals Council, which remanded the matter to the ALJ for a second hearing.

Following the second hearing, the ALJ denied Petitioner's claim on the grounds that, although she was unable to perform her past relevant work, Petitioner was able to perform other jobs which existed in significant numbers in the national economy (Joint Appendix at 26-27.) The ALJ reached the foregoing determination first by rejecting the opinion of Petitioner's treating physician, second by rejecting the credibility of Petitioner's own testimony, and finally by drawing conclusions from the testimony of a vocational expert to whom the ALJ posed certain vocational hypothetical questions (Joint Appendix at 12-27.)

---

[2] The district court erroneously states that Petitioner seeks "supplemental security income benefits (SSI) under the Social Security Act." (Joint Appendix at 119.) In fact, Petitioner's application was for disability *insurance* benefits under Title II of the Social Security Act – not for SSI benefits under Title XVI of the Social Security Act. *See* Joint Appendix at 11 and 28, whereat the ALJ correctly notes this fact. However, even the ALJ cites SSI regulations in error. (Joint Appendix at 12 and 20.) (Regulations beginning in "416" are SSI regulations.) The same legal standard of judicial review applies to both types of claims, however. *See* 42 U.S.C. § 1383(c)(3), which incorporates § 405(g) by reference, for SSI claims.

The Appeals Council declined to review the ALJ's decision. Petitioner then sought review in the district court, pursuant to 42 U.S.C. § 405(g).[3] She contended, inter alia, that the ALJ had rejected the treating physician's opinion supporting disability by applying incorrect legal standards (Joint Appendix at 73-77); the ALJ had rejected Petitioner's own testimony, and that of her lay witness, by incorrect legal standards (Joint Appendix at 77-86); the ALJ had failed to include all of Petitioner's limitations in the vocational hypothetical (Joint Appendix at 87-88); and the vocational expert's identification of other jobs Petitioner could perform was erroneous, conflicted with the Commissioner's own vocational resources, and was not supported by substantial evidence.[4] (Joint Appendix at 88-92.)

The district court ruled on four of the issues Petitioner had raised. First, it held that the ALJ did not err in rejecting the opinion of Petitioner's treating physician. (Joint Appendix at 126.) Second, the district court affirmed the ALJ's rejection of Petitioner's credibility. (Joint Appendix at 126-27.) Third, the district court affirmed the ALJ's exclusion from the vocational hypothetical questions limitations established by the treating

[3] Section 405(g) governs benefits other than disability insurance benefits and SSI. However, for the sake of simplicity, we will not refer to those benefits (which are not at issue herein).

[4] Petitioner sought an outright reversal of the agency's denial of disability benefits and an affirmative determination that she was entitled to those benefits; only as an alternative and lesser remedy did she seek a remand for further administrative proceedings on the merits of her claim.

physician and by Petitioner's testimony. (Joint Appendix at 127.)

Finally, however, the district court agreed with Petitioner that the ALJ's finding Petitioner able to perform other jobs was not supported by substantial evidence. (Joint Appendix at 127-28.) Because "the Secretary ha[d] not sustained her burden of showing that claimant can engage in substantial gainful work in the economy," the district court remanded the case, pursuant to sentence four of 42 U.S.C. § 405(g), "for further proceedings in accordance with [the district court's] opinion." (Joint Appendix at 128.)

Petitioner appealed the district court's judgment to the United States Court of Appeals for the Ninth Circuit because Petitioner had proven that she was entitled to disability insurance benefits as a matter of law.[5] (Pet. C.A. Brief at 18 and 35.)

[5] In *Gilliland v. Heckler*, 786 F.2d 178 (3d Cir. 1986), the court cited the established rule that the circuit courts, like the district courts, have the power to remand for payment of benefits. *Id.* at 184.

In the Ninth Circuit, the appellate court has exercised its power to remand for payment of benefits in numerous cases. *See*, e.g., *Bilby v. Schweiker*, 762 F.2d 716 (9th Cir. 1985); *Fife v. Heckler*, 767 F.2d 1427 (9th Cir. 1985); *Lester v. Chater*, 81 F.3d 821 (9th Cir. 1995); *Pitzer v. Sullivan*, 908 F.2d 502 (9th Cir. 1990); *Ramirez v. Shalala*, 8 F.3d 1449 (9th Cir. 1993); *Sprague v. Bowen*, 812 F.2d 1226 (9th Cir. 1987); and *Varney v. Secretary of HHS*, 859 F.2d 1396 (9th Cir. 1988) (*Varney II*).

All circuits recognize that the courts have the power to reverse the agency's decisions and remand for payment of benefits pursuant to § 405(g) when remand for further proceedings would serve no purpose. *See*, for example, *Jenkins v. Sullivan*, 906 F.2d 107, 109 (4th Cir. 1990); *Rivera v. Sullivan*, 923

The ALJ decided Petitioner's claim at step five of the sequential analysis where the Commissioner has the burden of production of evidence. *See Heckler v. Campbell*, 461 U.S. 458 (1983); and 20 C.F.R. § 404.1520(f). The ALJ relied on vocational expert testimony to provide evidence of the existence of jobs The vocational expert identified two occupations as described in the *Dictionary of Occupational Titles*[6] That Petitioner purportedly could perform given her vocational profile and residual functional capacity – the occupations of food and beverage order clerk and telephone answering service operator. (*See* Joint Appendix at 25.) However, the district court agreed with Petitioner that Petitioner could not perform those occupations given her residual functional capacity. The district court concluded that the Commissioner had not met his burden of "proof" at step five of the sequential analysis. (Joint Appendix at 128.)

Because the Commissioner had not satisfied his burden of production, the district court should have entered judgment reversing the Commissioner's final decision

F.2d 964, 970 (2d Cir. 1991); and *Thompson v. Sullivan*, 957 F.2d 611, 614 (8th Cir. 1992).

This case involves only whether Petitioner may appeal, and does not require the Court to resolve any conflict or pseudo-conflict among the circuits with respect to the exact *standard* for reversing the agency's decision without remanding for additional proceedings. *Cf. United States v. Jose*, 117 S.Ct. 463, 465 (1996) ("We express no opinion on the merits of the underlying dispute. The matter, indeed, is one that implicates an intercircuit conflict.")

[6] Employment and Training Admin., U.S. Dep't of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991).

without a remand for a rehearing, *i.e.*, the court should have entered judgment finding Petitioner disabled. Instead, the district court entered judgment to permit the agency an opportunity to provide additional evidence at step five even though the agency previously had proffered evidence about the availability of jobs given the precise assumptions the district court accepted as true. (Joint Appendix at 128.) In other words, the district court accorded the Commissioner, without explicit rationale or justification, another 'bite at the apple' when the agency record already was fully developed with respect to the relevant issues, and Petitioner's entitlement to benefits was clear.

By published OPINION filed March 4, 1997[7] the Ninth Circuit Court of Appeals dismissed Petitioner's appeal, holding as follows:

> Forney prevailed in district court by securing a remand to the Secretary pursuant to sentence four of 42 U.S.C. § 405(g). The remand order terminated her civil action favorably to her, and she is the prevailing party. **As a prevailing party, she cannot appeal the remand order.** Accordingly, Forney's appeal is DISMISSED.

Forney, 108 F.3d at 234 (Joint Appendix at 144) (bold emphasis added).

By unpublished Order filed May 29, 1997, the Ninth Circuit also denied Petitioner's petition for rehearing.

[7] *See Forney v. Chater*, 108 F.3d 228 (9th Cir. 1997).

SUMMARY OF ARGUMENT

42 U.S.C. § 405(g) empowers a federal court to grant Social Security claimants various degrees of relief, *including* outright reversal of the agency's decision and remand for payment of benefits. In the district court, Petitioner sought, inter alia, outright reversal of the agency's decision and remand for payment of benefits. (*See* Joint Appendix at 92-93.) Petitioner was aggrieved by the district court's judgment, in that it granted her less than all the relief she sought. Holdings favorable to Petitioner on any one of the district court's three adverse rulings would have conferred broader relief than that granted by the district court.

Petitioner has the right to appeal in an effort to obtain broader relief than that granted by the district court. Her right derives from the express language of the fourth sentence of 42 U.S.C. § 405(g):

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

Describing the *appealability* of a final judgment entered pursuant to the fourth sentence of 42 U.S.C. § 405(g), the eighth sentence of 42 U.S.C. § 405(g) provides:

> The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

"[I]n other civil actions," aggrieved parties who obtain final judgments granting less than all the relief sought normally have the right to appeal rulings on issues decided adversely to them, in attempts to obtain broader relief. Further, because Petitioner was aggrieved by the district court's three adverse rulings, Petitioner has the right to appeal the district court's judgment.

ARGUMENT

28 U.S.C. § 1291 CONFERS JURISDICTION ON THE APPELLATE COURTS TO REVIEW ALL FINAL DECISIONS OF THE DISTRICT COURTS[8]

28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from *all* final decisions of the district courts of the United States. . . . " (Emphasis added.) In accordance with the plain language of this statute, the Ninth Circuit Court of Appeals had jurisdiction to decide the merits of Petitioner's appeal because Petitioner's district court judgment, entered in accordance with 42 U.S.C. § 405(g), is a final decision, and because Petitioner was aggrieved by the judgment.

[8] Except where a direct review may be had in the Supreme Court.

A JUDGMENT ENTERED PURSUANT TO THE FOURTH SENTENCE OF 42 U.S.C. § 405(g) IS A FINAL DECISION, SUBJECT TO APPEAL UNDER 28 U.S.C. § 1291

This case squarely presents an issue this Court acknowledged, but reserved, in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990). To appreciate this, we first discuss *Melkonyan v. Sullivan*, 501 U.S. 89 (1991), where this Court construed *Finkelstein* as identifying two kinds of remands under 42 U.S.C. § 405(g): "(1) remands pursuant to the fourth sentence, and (2) remands pursuant to the sixth sentence." *Melkonyan*, 501 U.S. at 98 (citing *Finkelstein*, 496 U.S. at 623-629). Given "Congress' explicit delineation in § 405(g) regarding the circumstances under which remands are authorized," the Court held that "these were the *only* kinds of remands permitted under the statute." *Melkonyan*, 501 U.S. at 99-100.

Sentence four of 42 U.S.C. § 405(g) provides that the district court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." Under the text and structure of § 405(g), therefore, sentence-four remand orders are *ancillary to*, and "must [ ] accompany a final judgment affirming, modifying, or reversing the administrative decision in accordance with sentence four." *Melkonyan*, 501 U.S. at 101. Moreover, the eighth sentence of § 405(g) provides that the sentence-four judgment "shall be *final* except that it shall be subject to review in the same manner as a judgment in other civil actions." (Emphasis added.)

In *Finkelstein*, this Court recognized that in the fourth sentence of § 405(g), Congress had defined a class of orders as "final judgments" that "by inference would be appealable under § 1291." *Finkelstein*, 496 U.S. at 628. Accordingly, based on the express language of the statute, this Court held in *Finkelstein* that a district court's judgment entered pursuant to sentence four is a "final judgment" and may be appealed pursuant to § 1291 even though it is accompanied by a remand to the agency for further proceedings. *Finkelstein*, 496 U.S. at 625, 629.

As the Court further explained in *Finkelstein*, and as the Court reiterated in *Shalala v. Schaefer*, 509 U.S. 292 (1993):

> Under § 405(g), "each final decision of the Secretary [is] reviewable by a separate piece of litigation," and a sentence-four remand order "*terminate[s]* the civil action" seeking judicial review of the Secretary's final decision. 496 U.S., at 624-625 (emphases added [by the *Schaefer* Court]).

Schaefer, 509 U.S. at 299. Accordingly, any decision of the Commissioner upon remand will be subject to judicial review in a "separate piece of litigation," *i.e.*, a new civil action.[9] *Finkelstein*, 496 U.S. at 625. The *Finkelstein* Court thus held that the government could appeal a sentence four reversal/remand for rehearing, but the court

---

[9] *See, e.g., Frizzell v. Sullivan*, 937 F.2d 254, 255-57 (5th Cir. 1991), where the Fifth Circuit construed *Finkelstein* as requiring the claimant to institute a new civil action to obtain judicial review of the agency's final decision following a sentence four remand.

expressly reserved the issue of whether or not a claimant could do so. *Finkelstein*, 496 U.S. at 623 n.3.

After finding that the agency's decision denying Petitioner's claim for benefits was not supported by substantial evidence, the district court entered a judgment remanding for additional proceedings. (Joint Appendix at 128-29.) The parties and the U.S. Court of Appeals for the Ninth Circuit all agree that the district court's judgment was entered pursuant to sentence four of 42 U.S.C. § 405(g).[10] *Forney*, 108 F.3d at 230 & 231 n.1; Joint Appendix at 133 & 137 n.1; and Brief For The Respondent upon Petition for a Writ of Certiorari herein, at 3.

---

[10] Although not at issue herein, a district court also has the power, in limited circumstances, to remand a case to the Commissioner pursuant to sentence six of 42 U.S.C. § 405(g). The first clause of sentence six empowers the court, on motion of the Commissioner, made for good cause shown before he files his answer to the complaint, to remand the case to the Commissioner for further action. Additionally, the court may, at any time, order that additional evidence be taken before the Commissioner, but only upon a showing that there is new and material evidence and that there is good cause for the failure to incorporate the evidence in the record in the prior administrative proceedings.

Unlike a sentence-four remand, a sentence-six remand does not terminate the civil action challenging the Commissioner's decision denying benefits. The district court therefore retains jurisdiction during the administrative proceedings on remand. Accordingly, the second clause of sentence six requires the Commissioner to file with the court any "additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based," so that the district court may then enter its *final* sentence-*four* judgment in the case. *See Finkelstein*, 496 U.S. at 627-28.

In direct reliance on this Court's holding in *Finkelstein*, the Ninth Circuit correctly held that the sentence-four remand judgment herein is "final" with respect to "all parties. . . . " *Forney*, 108 F.3d at 232. (Joint Appendix at 139.) That is, the judgment was not merely interlocutory, and it "*terminate[d]* the civil action." *Id.* (citing *Sullivan v. Finkelstein*, 496 U.S. 617 (1990) (emphasis added.))

Without phrasing its discussion in terms of jurisdiction, the Ninth Circuit implicitly questioned its jurisdiction under § 1291. In addition, the Ninth Circuit held that Petitioner did not have the right immediately to appeal the adverse findings contained in the district court's *final judgment* and to seek on appeal the relief denied by the district court, because Petitioner was "a prevailing party." *Forney*, 108 F.3d at 232-34. (Joint Appendix at 139-44.)

IN THE FOURTH SENTENCE OF 42 U.S.C. § 405(g), CONGRESS GRANTED BROAD JUDICIAL AUTHORITY

Inasmuch as it is established that judgments entered pursuant to sentence four are appealable, and that 28 U.S.C. § 1291 confers upon the appellate court jurisdiction to hear an appeal, it remains only to determine whether **Petitioner** may appeal the district court's judgment herein.[11] As an aggrieved party, Petitioner submits

---

[11] As stated above, in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), this Court expressly held that the *agency* could appeal from a sentence four judgment which aggrieved the agency. *Finkelstein*, 496 U.S. at 628-29. The Court reserved the issue of whether or not an aggrieved *claimant* could do so. *Id.* 496 U.S. at 623, n.3.

she may appeal. Petitioner is an aggrieved party because the district court granted her less relief than that to which she was legally entitled (including, among other things, an outright award of benefits). Sentence four of § 405(g) states:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

Sentence four thus authorizes federal courts to grant varying degrees of relief. Such relief may take at least the following forms:

- No relief – the court affirms the agency's decision;
- Partial relief – the court enters judgment reversing the agency's final decision and remanding for a rehearing; and
- Full relief – the court enters judgment reversing the agency's decision and remands for calculation of benefits (*i.e.*, "without remanding the cause for a rehearing").

Contrasting the judicial grant of authority in § 405(g) with the grant of authority under the Administrative Procedure Act, this Court, in *Sullivan v. Hudson*, 490 U.S. 877 (1989), noted as follows:

> As provisions for judicial review of agency action go, § 405(g) is somewhat unusual. The detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings

with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act. As one source puts it:

> "The remand power places the courts, not in their accustomed role as external overseers of the administrative process, making sure that it stays within legal bounds, but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council when they act upon a request to reopen a decision on the basis of new and material evidence." J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals 133 (1978).

Hudson, 490 U.S. at 895.

THE RIGHT TO APPEAL TURNS NOT ON WHICH PARTY PREVAILS, BUT ON WHICH PARTY WAS (OR PARTIES WERE) *AGGRIEVED*

Although the Ninth Circuit held that, *as the prevailing party*, Petitioner could not appeal, *Forney*, 108 F.3d at 234 (Joint Appendix at 144), this Court has expressly held "that appellate jurisdiction over final decisions does not turn on which side prevailed in the District Court." *Jose*, 117 S.Ct. 463, 465 (1996). In *Jose*, this Court expressly recognized that once it is established that appellate jurisdiction lies, the appellate court may hear an appeal by a party who was aggrieved by the district court's order, even though that party may have prevailed *in part* before

the district court (as Petitioner did in proceedings herein). *Jose,* 117 S.Ct. at 465.

An order that "ends the litigation on the merits" may be appealed by the party or parties aggrieved, pursuant to 28 U.S.C. § 1291. *See* 20 *Moore's Federal Practice* § 303.10 [2] [a] (3d ed. 1997). While a party "who receives *all* that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 333 (1980) (emphasis added), Petitioner did not receive *all* the relief she sought.

When a Social Security disability insurance benefits claimant files a court action, seeking reversal of the agency's decision "*without* remanding the cause for a rehearing," *see* 42 U.S.C. § 405(g), sentence four, the claimant is aggrieved by a court's judgment which fails to reverse the agency's decision and order an award of benefits. The claimant may also be aggrieved by specific holdings of the district court, such as the district court's holdings hereinbelow (*see* Joint Appendix at 125-27), that the ALJ properly found Petitioner's complaints not credible and discounted the report of the treating physician.

It is manifest that Petitioner was aggrieved by the district court's judgment.[12] Accordingly, she may appeal. "[A] party aggrieved by a judgment or order of a district

[12] See also Brief For The Respondent upon Petition for a Writ of Certiorari, herein, at page 9, conceding not only that Petitioner was aggrieved, but that she was "sufficiently aggrieved" to be entitled to appellate review.

court may exercise the statutory right to appeal therefrom." *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 333 (1980). As the Solicitor General acknowledges (Brief For The Respondent upon Petition for a Writ of Certiorari, at 9, n.5), the issue is *not* whether the party "prevailed" in the district court (as the Ninth Circuit held), but whether the party is "aggrieved" by that court's judgment.[13]

Nothing in § 405(g) *requires* the claimant to accept the burden of a remand (as the Ninth Circuit would require) before obtaining appellate review on *dispositive* legal issues. To the contrary, the fourth and eighth sentences of § 405(g) expressly contemplate that the parties may take an immediate appeal from adverse holdings contained in a district court's final decision, even though the court entered judgment reversing the Commissioner's final decision and remanded the cause to the agency for a rehearing.

AN APPEAL AT THIS STAGE OF THE PROCEEDINGS WILL NOT BE A "PIECEMEAL" APPEAL

Although acknowledging that Petitioner, as a "prevailing party" for purposes of an attorney fee award, was

[13] Although the Ninth Circuit recognized that "the status of prevailing party for purposes of attorney's fees under 28 U.S.C. § 2412(d)(1)(B) does not automatically equate with status as prevailing part for purposes of appeal," *Forney,* 108 F.3d at 232 (Joint Appendix at 140), the appellate court held that "[t]here are compelling reasons . . . for declining to permit a claimant in Forney's position from appealing the remand order." *Id.*

not *necessarily* a "prevailing party for purposes of appeal,"[14] the Ninth Circuit declined to hear Petitioner's appeal, for "the same reasons that underlay the long-established general rule that a remand to an administrative agency was not appealable. . . . " *Forney*, 108 F.3d at 232. (Joint Appendix at 140.)

In determining that Petitioner may not appeal her sentence-four judgment, the Ninth Circuit failed adequately to distinguish between remand *judgments* which *terminate the civil action* and remand *orders* which are merely interlocutory.

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), this Court noted that indicia of finality, for purposes of conferring jurisdiction upon a court to exercise immediate appellate review, are: 1) the district court "disposed of the entire complaint"; and 2) "Every prayer for relief was passed upon." *Id.* at 308. This further supports that Petitioner's sentence-four judgment is final and immediately appealable, because her sentence-four judgment disposed of the entire complaint, passed upon every prayer for relief, *and terminated the civil action. See Finkelstein*, 496 U.S. at 625.

---

[14] In *Shalala v. Schaefer*, 509 U.S. 292 (1993), this Court noted that "prevailing party" status for fee award purposes has been obtained "[i]f the plaintiff has succeeded on *any* significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit." *Schaefer*, 509 U.S. at 302 (emphasis added). Thus, the Ninth Circuit is correct that "prevailing party" status for purposes of a fee award does not equate with "prevailing party" status for purposes of appeal.

At odds with this Court's holding in *Brown Shoe Co.*, the Ninth Circuit provided the following rationale for declining to allow Petitioner immediately to appeal the district court's adverse rulings:

> There are compelling reasons, however, for declining to permit a claimant in Forney's position from appealing the remand order she succeeded in obtaining. They are the same reasons that underlay the long-established general rule that a remand to an administrative agency was not appealable, with an exception only for the Secretary who might be precluded from post-remand access to the court. *See, e.g., Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247 (Fed. Cir. 1992). Forney may, on remand, secure all of the relief she seeks. If she does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record. *See Travelstead*, 978 F.2d at 1247. All of these considerations lead us to conclude that we ought not to entertain Forney's present appeal.[6]
>
> [Footnote 6:] We do not follow, therefore, the example of the Tenth Circuit in *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994). There the court of appeals permitted a claimant to appeal a sentence-four remand order, stating in a footnote that such remand orders were "final and appealable" under *Finkelstein*. *Id.* at 1402 n. 2. We have

> found no other published decision permitting appeal of such a remand order by a claimant. The outcome of the claimant's appeal was most unusual; the remand order, which had been invited by the Secretary, was held to be improper and the Secretary's denial of benefits was ordered reinstated. *Id.* at 1403-04. Thus the only party that appealed, the claimant, was left worse off for having appealed. We conclude that this scenario is unlikely to be repeated, and that appeal of a remand order by a claimant normally will leave further-administrative proceedings to follow regardless of the outcome of the appeal. For that reason, judicial economy militates against permitting the prevailing claimant to appeal.

Forney, 108 F.2d at 232-33. (Joint Appendix at 140-41.)

The Ninth Circuit's rationale does not apply to Petitioner. Petitioner's appeal will not result in a "piecemeal" appeal, which "normally will leave further administrative proceedings to follow regardless of the outcome of the appeal." *Forney*, 108 F.3d 233 n.6. (Joint Appendix at 141 n.6.) Instead, if the appellate court addressed Petitioner's arguments on the merits and ruled for the Petitioner, the appellate court should order an award of benefits, terminating the controversy *and* the civil action.

The circumstances present in the instant case are thus unlike the situations discussed in *Travelstead v. Derwinski*, 978 F.2d 1244 (Fed. Cir. 1992), relied upon by the Ninth Circuit. The court in *Travelstead* recited the general rule that *interlocutory remand orders* are not appealable. *Id.* at 1247. *Travelstead* then cited *Cabot Corp. v. United States*,

788 F.2d 1539 (Fed. Cir. 1986), and noted that the *Cabot Corp.* analysis suggested that "appeals of such [remand] orders would vitiate the important interests served by the final judgment rule. [footnote omitted] We noted that this rule 'helps preserve the respect due trial judges by minimizing appellate-court interference. . . . ' " *Travelstead*, 978 F.2d at 1247 (bracketed comments added).

Here, the final judgment rule against appeals from interlocutory remand orders does not apply, because (unlike the interlocutory remand order discussed in *Travelstead*) Petitioner's sentence-four judgment (with remand) *is* a final judgment. Petitioner's final judgment *terminated the civil action*, and there is no danger of "appellate-court interference" with the district court's judicial autonomy. The district court proceedings are completed. The district court's decision herein "leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Indeed, as this Court noted in *Finkelstein*, if Petitioner still is aggrieved after the completion of proceedings after a sentence-four remand, she can obtain judicial review *not* by initiating further review in the original civil action, but instead by filing a *new* complaint. *Finkelstein*, 496 U.S. at 625.

Because Petitioner will, if still aggrieved after the completion of remand proceedings, be required to initiate a *new* civil action, there is no danger of "expense and delays of repeated appeals in the *same* suit." *Travelstead*, 978 F.2d at 1247 (emphasis added).

Nor is an appeal herein contraindicated by a "preference for review of a fully-developed record in contrast to

determination of legal questions in the abstract." *Travelstead*, 978 F.2d at 1247. The record *is* fully developed as regards the issues Petitioner seeks to appeal, and if Petitioner prevails on those issues, not only should there be no further proceedings before the district court, there will be no remand proceedings before the agency. For all of these reasons, the Ninth Circuit's reliance on the factors recited in *Travelstead* is misplaced.

Moreover, the Ninth Circuit overlooked a critical point: *after* reciting the factors which generally counsel against the exercise of appellate jurisdiction in agency remand cases, the *Travelstead* court held that if the court's "order in this case 'reversing the decision of the [agency],' . . . '**terminated the [ ] action** challenging the Secretary's final determination,' then it is final and appealable under *Finkelstein*." *Travelstead*, 978 F.2d at 1248 (emphasis added). Setting forth a critical point which the Ninth Circuit neglected to acknowledge, the *Travelstead* court concluded, "The principal directive of *Finkelstein* is that remands are not all of the same nature. Some are final; some are not." *Travelstead*, 978 F.2d at 1249. Inherent in the court's observation is the court's conclusion that, although an immediate appeal might not be taken from remands which are not final, an appeal *may* be taken from remands which *are* final (such as the sentence-four judgment at issue herein). There is no question that Petitioner's sentence-four judgment terminated the civil action, and thus, in accordance with *Travelstead*, "it is final and *appealable* under *Finkelstein*." *Travelstead*, 978 F.2d at 1248.

In relying upon *Travelstead*, the Ninth Circuit misconstrued the entire body of law underpinning the rule

that interlocutory orders typically are not immediately appealable under § 1291. As this court held in *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), "a final decision for purposes of § 1291" is a decision that puts the would-be appellant "effectively out of court." *Moses H. Cone Hospital*, 460 U.S. at 10 & n.11. Here, Petitioner's sentence-four final judgment puts her "effectively out of court," because it *terminates* the civil action.

Summarizing the policy reasons behind the finality requirement of § 1291, this Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), stated as follows:

> We have consistently interpreted this language [of § 1291] as indicating that a party may not take an appeal under this section until there has been a "decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the

> obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). *See DiBella v. United States*, 369 U.S. 121, 124 (1962).

Firestone Tire & Rubber, 368 U.S at 373-74.

Petitioner's assertion of right to appeal is consistent with all of the factors discussed in *Firestone Tire & Rubber*. First, the district court's *final judgment* hereinbelow leaves nothing for the district court to do but execute the judgment. Moreover, the rule that "a party must ordinarily raise all claims of error in a single appeal following *final judgment* on the merits" is consistent with Petitioner's assertion of right, because she *is* raising all of her claims "in a single appeal following *final judgment* on the merits." In a sentence-four remand case, there is no piecemeal appeal which would undermine the independence of the district judge, because entry of a sentence-four judgment *terminates* the district court proceedings. Finally, there is no possibility of "harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." This is so because a sentence-four judgment is the *final* judgment in the district court proceedings, and any appeal therefrom will be taken in one consolidated proceeding.

The Ninth Circuit's reliance on *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991) is also misguided. In *Perales*,

the court stated, "A district court's remand to an administrative agency . . . keeps a case alive and *hence* is ordinarily not appealable."[15] *Perales*, 948 F.2d at 1353 (emphasis added). As this Court held in *Finkelstein*, however, a judgment entered pursuant to sentence four of § 405(g) (whether or not accompanied by a remand order) does *not* "keep a case alive." Instead, this Court held, a sentence-four judgment *terminates* the civil action. *Finkelstein*, 496 U.S. at 625.

This Court's holding in *Flanagan v. United States*, 465 U.S. 259 (1984) eloquently demonstrates why the Ninth Circuit's citation to *Perales* (and the Ninth Circuit's rationale surrounding the issue of appealability) is inapposite. In *Flanagan*, this court stated as follows:

> [T]his Court has long held that the policy of Congress embodied in [§ 1291] is inimical to piecemeal appellate review of trial court decisions **which do not terminate the litigation**. . . . " *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

Flanagan, 465 U.S. at 264 (emphasis added).

The entirety of the Ninth Circuit's discussion relies on policies developed to further the efficient and orderly review of "trial court decisions **which do not terminate the litigation.**" *Flanagan*, 465 U.S. at 264 (emphasis added). However, that rationale does not apply herein,

---

[15] In *both* cases cited by the Ninth Circuit to support its decision, the courts ultimately held that there was jurisdiction to hear the appeals. *Travelstead*, 978 F.2d at 1249; *Perales*, 948 F.2d at 1353.

because the district court's judgment *terminated* the litigation.

The Ninth Circuit's rationale also fails to acknowledge that Petitioner seeks to appeal *not* from the remand order itself, but from the adverse rulings on issues upon which the district court *declined* to grant relief. The district court's adverse holdings on these issues are what are made "final" by the judgment entered pursuant to § 405(g).[16]

---

[16] Petitioner appealed the district court's judgment not only because she did not receive a judgment reversing without a remand for a rehearing. She appealed for the additional reason that if she did not challenge several of the adverse holdings underlying the district court's judgment, her chances of success in further administrative proceedings on remand would be significantly diminished. For example, the district court upheld the ALJ's finding that Petitioner's allegations of back pain were "not credible." Under either the law of the case or issue preclusion, Petitioner could not establish during any renewed administrative proceedings that her allegations of back pain were credible (at least during the period adjudicated by the ALJ) unless, for example, she overcame with additional evidence the ALJ's prior adverse credibility finding. Because the extent of a claimant's limitations often is dispositive in disability adjudications even when vocational considerations are taken into account at step five of the sequential analysis, *see*, e.g., *Varney v. Secretary of HHS*, 859 F.2d 1396, 1399-1401 (9th Cir. 1988) (*Varney II*), it was in Petitioner's interest to challenge the district court's holding with respect to the ALJ's credibility finding. The Ninth Circuit, in dismissing Petitioner's claim, was insufficiently appreciative of the importance to Petitioner of the law of the case and issue preclusion.

THE CIRCUIT COURTS OF APPEALS HAVE ALLOWED CLAIMANTS IN PETITIONER'S POSITION TO APPEAL

The Ninth and Tenth Circuits have published opinions permitting immediate appeals, by "prevailing" (yet aggrieved) plaintiffs, of judgments of remand pursuant to sentence four of § 405(g).[17] *Atkins v. Shalala*, 837 F.Supp. 318 (D. Or. 1993), *as modified by Atkins v. Shalala*, 70 F.3d 529 (9th Cir. 1995);[18] and *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994). Because of the conflict between the published decision in *Atkins* and the published decision in *Forney*, the Ninth Circuit has an intra-circuit conflict, which the *Forney* court did not address.

In *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994), the Tenth Circuit expressly noted that the court *had* jurisdiction to hear the prevailing claimant's appeal. *See Nguyen*, 43 F.3d at 1402 n.2: "A reversal and remand ordered pursuant to the fourth sentence of 42 U.S.C. § 405(g), is

---

[17] In the Petition for a Writ of Certiorari, at page 11, Petitioner cited *Richmond v. Chater*, 94 F.3d 263 (7th Cir. 1996), and asserted this case had permitted a claimant immediately to appeal from a sentence-four remand order. Upon further analysis, it appears that assertion was erroneous.

[18] In *Atkins*, without discussing jurisdiction, the court assumed jurisdiction to lie. Counsel is aware of the rule that the courts are "not bound by previous exercises of jurisdiction in cases in which [the courts'] power to act was not questioned but was passed *sub silentio*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962). However, the *Brown Shoe* Court also noted, "neither should we disregard the implications of an exercise of judicial authority assumed to be proper" for a number of years. *Id.*

final and appealable. *See Sullivan v. Finkelstein*, 496 U.S. 617 [. . .] (1990)."

Atkins and *Nguyen* are consistent with this court's holdings in *Finkelstein* and *Schaefer* that judgments entered pursuant to sentence four of § 405(g) are **appealable,** *even though* accompanied by a remand order. Those cases also are consistent with this Court's holding, in *United States v. Jose*, 117 S.Ct. 463, 465 (1996), that the *aggrieved* party or parties may appeal.

In *United States v. Jose*, 117 S.Ct. 463, 465 (1996), the Supreme Court noted that it previously had granted a writ involving a case similar to *Jose*, and "We hardly would have done so had we considered the matter unfit for review." *Id.* The Ninth and Tenth Circuits, when adjudicating the appeals in *Atkins* and *Nguyen*, "hardly would have done so had [the Ninth and Tenth Circuits] considered the matter[s] unfit for review." In holding that Petitioner could not appeal, the Ninth Circuit erred.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit. This Court should hold that a Social Security disability claimant who obtains a district court judgment reversing a final decision of the Commissioner with a remand for rehearing pursuant to 42 U.S.C. § 405(g) has the right immediately to appeal adverse rulings, when the district court judgment aggrieves the claimant, and when greater relief

would be granted if the adverse rulings were to be resolved in the claimant's favor, upon appeal.

Petitioner's request for relief before this Court is limited to the issue of appealability, and she does not ask this Court to consider the merits of her underlying claim for disability insurance benefits.

Respectfully submitted,

RALPH WILBORN
Counsel Of Record
For Petitioner

ETTA L. WILBORN

TIM WILBORN

RALPH WILBORN and
ETTA L. WILBORN, P.C.
1580 Valley River Drive,
Suite 170
Eugene, Oregon 97401
(541) 485-4265

ERIC SCHNAUFER
2501 N. Lincoln Ave., #285
Chicago, Illinois 60614
(773) 935-4016

Supreme Court, U.S.
FILED
FEB 27 1998
CLERK

No. 97-5737

In the Supreme Court of the United States

OCTOBER TERM, 1997

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN SUPPORT OF REVERSAL

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
LISA SCHIAVO BLATT
Assistant to the Solicitor General
WILLIAM KANTER
MARY K. DOYLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an order of remand by a district court under the fourth sentence of 42 U.S.C. 405(g) is subject to appeal by a Social Security claimant who is aggrieved by that order in that she sought outright reversal of the underlying administrative decision without remanding for further rehearing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	8
Argument:	
The court of appeals has jurisdiction over petitioner's challenge to the district court's order of remand under the fourth sentence of 42 U.S.C. 405(g)	10
A. The district court's sentence-four judgment is a final decision that is appealable under 28 U.S.C. 1291	10
B. Petitioner may appeal because she is aggrieved by the district court's judgment	16
C. The practical consequences of a claimant's appeal of a district court's final judgment remanding to the Commissioner are limited and do not furnish a basis for an exception to appealability	26
Conclusion	35
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Agostini v. *Felton*, 117 S. Ct. 1997 (1997)	33
Allen v. *McCurry*, 449 U.S. 90 (1980)	33
Arizonans For Official English v. *Arizona*, 117 S. Ct. 1055 (1997)	17
Atkins v. *Chater*, 70 F.3d 529 (9th Cir. 1995)	22, 27
Barrett v. *Shalala*, 38 F.3d 1019 (8th Cir. 1994)	25
Bean v. *Chater*, 77 F.3d 1210 (10th Cir. 1995)	25

Cases—Continued: Page

Bohms v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968) 12
Bowen v. *Yuckert*, 482 U.S. 137 (1987) 3
Bryant v. *Yellen*, 447 U.S. 352 (1980) 17
Buzzard v. *Shalala*, 36 F.3d 1102 (9th Cir. 1994) . 23
California v. *Rooney*, 483 U.S. 307 (1987) 18, 32
Carrigan v. *Exxon Co.*, 877 F.2d 1237 (5th Cir. 1989) 21
Castle v. *Rubin*, 78 F.3d 654 (D.C. Cir. 1996) 21
Chavez v. *Department of Health & Human Servs.*, 103 F.3d 849 (9th Cir. 1996) 25
Concerned Citizens of Cohocton Valley, Inc. v. *New York Dep't of Envt'l Conserv.*, 127 F.3d 201 (2d Cir. 1997) 31
Davis v. *Shalala*, 985 F.2d 528 (11th Cir. 1993) 29
Deposit Guaranty Nat'l Bank v. *Roper*, 445 U.S. 326 (1980) 8, 17, 18, 19, 31
Diamond v. *Charles*, 476 U.S. 54 (1986) 17
Disher v. *Information Resources, Inc.*, 873 F.2d 136 (7th Cir. 1989) 21
Electrical Fittings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241 (1939) 18, 31
EEOC v. *Chicago Club*, 86 F.3d 1423 (7th Cir. 1996) 31
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 24, 34
FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) 34
FPC v. *Pacific Power & Light Co.*, 307 U.S. 156 (1939) 23
Faucher v. *Secretary of Health & Human Servs.*, 17 F.3d 171 (6th Cir. 1994) 29
Gargoyles, Inc. v. *United States*, 113 F.3d 1572 (Fed. Cir. 1997) 21
Gifford v. *Chater*, 77 F.3d 488 (9th Cir. 1996) 22
Gilliland v. *Heckler*, 786 F.2d 178 (3d Cir. 1986) ... 29

Cases—Continued: Page

Graziano v. *Harrison*, 950 F.2d 107 (3d Cir. 1991) 21
Gunn v. *University Comm. to End the War in Vietnam*, 399 U.S. 383 (1970) 18
Heckler v. *Campbell*, 461 U.S. 458 (1983) 3
ICC v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) 13
INS v. *Chadha*, 462 U.S. 919 (1983) 18
Ingram v. *Chater* 107 F.3d 598 (8th Cir. 1997) 28
JM Muniz, Inc. v. *Mercantile Texas Credit Corp.*, 833 F.2d 541 (5th Cir. 1987) 32
Jean v. *Nelson*, 863 F.2d 759 (11th Cir. 1988), aff'd on other grounds, 496 U.S. 154 (1990) 27
Joyal v. *Department of Health & Human Servs.*, 37 F.3d 1505 (9th Cir. 1994) 22
Kendrick v. *Shalala*, 998 F.2d 455 (7th Cir. 1993) 16
LaBuhn v. *Bulkmatic Transport Co.*, 865 F.2d 119 (7th Cir. 1988) 21, 31
La Plante v. *American Honda Motor Co.*, 27 F.3d 731 (1st Cir. 1994) 21
Melkonyan v. *Sullivan*, 501 U.S. 89 (1991) 11
Monongahela Valley Hospital, Inc. v. *Sullivan*, 945 F.2d 576 (3d Cir. 1991) 14
Nguyen v. *Shalala*, 43 F.3d 1400 (10th Cir. 1994) 27
Parker v. *Harris*, 626 F.2d 225 (2d Cir. 1980) 29
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 32, 33, 34
Parr v. *United States*, 351 U.S. 513 (1956) 21
Perez v. *Ledesma*, 401 U.S. 82 (1971) 18
Podedworny v. *Harris*, 745 F.2d 210 (3d Cir. 1984) 28-29
Ragen Corp. v. *Kearney & Trecker Corp.*, 912 F.2d 619 (3d Cir. 1990) 21

Cases—Continued: Page

Ragland v. *Shalala*, 992 F.2d 1056 (10th Cir. 1993) 28
Rodriguez v. *Bowen*, 876 F.2d 759 (9th Cir. 1989) . 29
Rueda-Menicucci v. *INS*, 132 F.3d 493 (9th Cir. 1997) 14
Shalala v. *Schaefer*, 509 U.S. 292 (1993) 8, 13, 14, 15, 23, 27
Springer v. *Chater*, 91 F.3d 155 (9th Cir. 1996) 22
Stone v. *Heckler*, 761 F.2d 530 (9th Cir. 1985) 28
Sullivan v. *Finkelstein*, 496 U.S. 617 (1990) . 6, 8, 10, 11, 12, 13, 14, 15, 16
Sullivan v. *Zebley*, 493 U.S. 521 (1990) 3
Swint v. *Chambers County Comm'n*, 514 U.S. 35 (1995)..... 16
Taylor v. *Chater*, 118 F.3d 1274 (8th Cir. 1997) 29
Travelstead v. *Derwinski*, 978 F.2d 1244 (Fed. Cir. 1992) 14
United States v. *Jose*:
117 S. Ct. 463 (1996) 19, 20, 23, 26
71 F.3d 1484 (9th Cir. 1995) 19
United States v. *McAndrews*, 12 F.3d 273 (1st Cir. 1993) 20
United States v. *Mendoza*, 464 U.S. 154 (1984) 33, 34
United States v. *Zolin*, 491 U.S. 554 (1989) 20
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 13
Waggoner v. *Chater*, 81 F.3d 171 (9th Cir. 1996) ... 22
Weaver v. *Chater*, 67 F.3d 310 (9th Cir. 1995) 22

Constitution, statutes, regulations and rules:

U.S. Const. Art. III 8, 17, 19
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 13

Statutes, regulations and rules—Continued: Page

Equal Access to Justice Act, 28 U.S.C. 2412 *et seq.*:
28 U.S.C. 2412(d) 27
28 U.S.C. 2412(d)(1)(A) 23
28 U.S.C. 2412(d)(1)(B) 13
Hobbs Act, 28 U.S.C. 2341 *et seq.* 13
28 U.S.C. 2350 13
Social Security Act, 42 U.S.C. 301 *et seq.*:
Title II:
§ 205(b), 42 U.S.C. 405(b) 3
§ 205(g), 42 U.S.C. 405(g) ..... *passim*
§ 216(i)(1)(A), 42 U.S.C. 416(i)(1)(A) 2
§ 221(a), 42 U.S.C. 421(a) 3
§ 223(a)(1)(D), 42 U.S.C. 423(a)(1)(D) 2
§ 223(d), 42 U.S.C. 423(d) 3
§ 223(d)(1)(A), 42 U.S.C. 423(d)(1)(A) 2
§ 223(d)(5), 42 U.S.C. 423(d)(5) 24
Title XVI:
§ 1611(a), 42 U.S.C. 1382(a) 2
Title XVIII (Medicare Act):
§ 1878, 42 U.S.C. 1395*oo*(f)(1) 14
Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476 2
28 U.S.C. 1291 ..... *passim*
38 U.S.C. 7261 14
20 C.F.R.:
Section 404.902(e) 23
Sections 404.929-404.982 3
Section 404.981 4
Section 404.983 28
Sections 404.1520-404.1576 2
Section 404.1520(b) 2
Section 404.1520(c) 2-3
Section 404.1520(d) 3
Section 404.1520(e) 3
Section 404.1520(f) 3

Regulations and rules—Continued:	Page
Section 404.1527	24
Section 404.1529	24-25
Pt. 404, Subpt. P, App. 1 (pt. A)	3
Fed. R. Civ. P. 23	18
Fed. R. Crim. P. 35(b)	20
Miscellaneous:	
Robert Bennett, M.D., *Fibrosititis: Does it exist and can it be treated ?*, The Journal of Musculoskeletal Medicine (June 1994)	4
Bruce C. Gilliland, *Relapsing Polychondritis and Other Arthritides*, 2 Harrison's Principles of Internal Medicine (14th ed. 1998)	4
Don Goldberg, M.D., *Fibromyalgia Syndrome*, 257 Journal of American Medical Ass'n (1987)	4
20 *Moore's Federal Practice* (3d ed. 1997)	17
Restatement (Second) of Judgments (1982)	30, 31, 33-34
15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (2d ed. 1992)	17, 30

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-5737

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN SUPPORT OF REVERSAL

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 108 F.3d 228. The opinion and order of the district court (Pet. App. 15-25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1997. A petition for rehearing was denied on May 29, 1997. Pet. App. 41. The petition for a writ of certiorari was filed on August 25, 1997, and was granted on January 16, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), and 28 U.S.C. 1291 are set forth in an Appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 423(a)(1)(D), provides for the payment of insurance benefits to persons who have contributed to the program and who are "under a disability."[1] The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 416(i)(1)(A).

The Commissioner of Social Security[2] has established a five-step sequential evaluation process for determining whether an adult person is disabled. See 20 C.F.R. 404.1520-404.1576. "The first two steps involve threshold determinations that the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. [20 C.F.R. 404.1520(b) and

[1] Title XVI of the Act provides for the payment of disability benefits to certain indigent persons under the Supplemental Security Income program. 42 U.S.C. 1382(a).

[2] The Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476, transferred the administration of the social security program from the Secretary of Health and Human Services (HHS) to the Commissioner of Social Security. During the course of this litigation, the Commissioner of Social Security was substituted as the defendant for the Secretary of HHS.

(c).] In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. [20 C.F.R. Pt. 404, Subpt. P, App. 1 (pt. A).] If the claimant's impairment matches or is 'equal' to one of the listed impairments, he qualifies for benefits without further inquiry. [20 C.F.R. 404.1520(d).] If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits. [20 C.F.R. 404.1520(e) and (f).]" *Sullivan* v. *Zebley*, 493 U.S. 521, 525-526 (1990); see also *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142 (1987); *Heckler* v. *Campbell*, 461 U.S. 458, 459-461 (1983).

The initial disability determination is made by a state agency acting under the authority of the Commissioner. 42 U.S.C. 421(a). If the state agency denies the disability claim, the claimant is entitled to a hearing before an administrative law judge (ALJ) and may request review by the Social Security Administration's (SSA) Appeals Council. 42 U.SC. 405(b); 20 C.F.R. 404.929-404.982. After a claimant exhausts those administrative procedures, he may seek judicial review in federal court. 42 U.S.C. 405(g). See *Bowen* v. *Yuckert*, 482 U.S. at 142.

2. In 1991, petitioner applied for disability benefits under 42 U.S.C. 423(d) alleging disability due to fibromyalgia and depression. Pet. App. 17, 26.[3] After

[3] Fibromyalgia is a condition characterized by musculoskeletal pain. Because of the general presence of normal

extensive proceedings, an ALJ denied petitioner's claim on the ground that, although she was incapable of returning to her former line of work as a cook and kitchen manager, she was able "to perform a wide range of sedentary [jobs] existing in significant numbers in the national economy." *Id.* at 35. In making that determination, the ALJ rejected the medical opinion of petitioner's treating physician (which had supported her disability claim); found that petitioner's own testimony lacked credibility in critical respects; drew conclusions from a vocational expert's answers to hypothetical questions concerning petitioner's impairments; and accepted that expert's testimony as to the kinds of work that petitioner was able to perform. *Id.* at 26-38; see also *id.* at 21-25. After SSA's Appeals Council denied petitioner's request for review, *id.* at 39, the ALJ's denial of benefits became the final decision of the Commissioner. 20 C.F.R. 404.981.

3. Petitioner sought judicial review in federal district court under 42 U.S.C. 405(g), requesting, as relief, "[t]hat th[e] court reverse and set aside the decision of [the Commissioner of Social Security] denying [petitioner's] claim for disability benefits." C.A. E.R. 242. Petitioner also requested, "[i]n the alternative, that th[e] court remand the case back

---

physical findings and laboratory results in patients with fibromyalgia, its diagnosis in large measure depends on an evaluation of the symptoms as reported by the patient. See generally Bruce C. Gilliland, *Relapsing Polychondritis and Other Arthritides*, 2 Harrison's Principles of Internal Medicine 1955-1957 (14th ed. 1998); Don Goldberg, M.D., *Fibromyalgia Syndrome*, 257 Journal of American Medical Ass'n 2782-2786 (1987); Robert Bennett, M.D., *Fibrosititis: Does it exist and can it be treated?*, The Journal of Musculoskeletal Medicine 57-72 (June 1984) (*reprinted at* C.A. E.R. 82-91).

to the [Commissioner] for proper evaluation of the evidence or a hearing *de novo*." *Ibid.* She contended, *inter alia*, that the ALJ should not have rejected either her treating physician's opinion or her own testimony concerning her disability, and that the ALJ's hypothetical questions to the vocational expert were improper. The district court rejected each of those arguments. Pet. App. 22-24.

The district court nonetheless determined, as petitioner had argued, that the record did not support the ALJ's finding that petitioner was capable of performing certain identified jobs existing in the national economy. Those jobs, the court observed, required "frequent or constant reaching," and the ALJ had not rejected another physician's "assessment that [petitioner's] ability to reach is impaired." Pet. App. 24. Thus, because "the [Commissioner] has not sustained [his] burden of showing that claimant can engage in substantial gainful work in the economy," the court remanded the case to SSA for further proceedings "in accordance with" the court's opinion. *Id.* at 25. That order was issued pursuant to the fourth sentence of 42 U.S.C. 405(g), which authorizes a district court to enter "a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." On May 24, 1995, the court entered its judgment "remand[ing] to the [Commissioner] for further proceedings." Pet. App. 14.

4. Petitioner appealed the district court's order, contending that she should prevail on the issues the district court had resolved against her and that, on that basis, the agency's decision should be reversed outright and the case should be remanded solely for

payment of benefits, not for additional administrative proceedings on the merits. See Pet. C.A. Br. 18 ("the agency's decision should be reversed and [petitioner] should be found disabled"); see also *id.* at 21, 27-28, 35; Pet. 2, 10.

The court of appeals dismissed the appeal on procedural grounds. Pet. App. 1-13.[4] The court acknowledged that, under *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), an order under sentence four that sets aside the Commissioner's decision denying benefits and remands to the Commissioner for further proceedings on the merits of the claim is "'final,' in a formalistic sense, for all parties to it." Pet. App. 10. Moreover, under sentence eight of 42 U.S.C. 405(g), that order "shall be subject to review in the same manner as a judgment in other civil actions." See *Finkelstein*, 496 U.S. at 625.

The court nonetheless held that the finality of the district court's judgment in this case "does not necessarily entitle [petitioner] to appeal the district court's decision," because "[a] prevailing party normally may not appeal the decision in its favor." Pet. App. 10. "There can be little doubt," the court continued, "that a claimant 'prevails' * * * when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits

[4] In its brief, the government had asked the court of appeals to address petitioner's claims on the merits. See Gov't C.A. Br. 1 (asserting that the district court's remand order is a "final" and "appealable" order, "over which this court has jurisdiction pursuant to 28 U.S.C. § 1291"). We have been informed, however, that at oral argument, after the court had given notice of its intent to address the issue, counsel for the government contended that petitioner's appeal should be dismissed for lack of jurisdiction.

claimed." *Ibid.* The court reasoned that, on remand, petitioner might secure all the relief she seeks and, "[i]f she does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record." *Id.* at 11.[5]

Finally, the court of appeals rejected petitioner's argument that, if she were awarded no benefits on remand and brought an entirely new civil action to challenge that adverse decision, principles of preclusion would bar her from challenging the district court's adverse rulings in the present action. Pet. App. 12. The court explained that, even though the district court might well adhere to its earlier rulings in the subsequent action, the critical question is whether petitioner could challenge those rulings on appeal. The court concluded that she would be entitled to do so, both because it would be "inappropriate to hold [her] to rulings that she was precluded from appealing," and because, in its view, the issues as to which she would seek appellate review in the subsequent action would not have been "essential to the judgment in the prior case." *Ibid.*

[5] The court of appeals acknowledged that "there may be instances when a claimant is foreclosed by the district court's remand decision from part of the benefits sought, and would then seek an appeal from the remand decision on the ground that broader relief should have been awarded. See *Finkeltein*, 496 U.S. at 623 n. 3." Pet. App. 10 n.5. The court expressed no view as to the claimant's right to appeal in that context. *Ibid.*

SUMMARY OF ARGUMENT

A. Under the express terms of the fourth and eighth sentences of 42 U.S.C. 405(g), as well as under *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), the district court's order and judgment in this case, which remanded the Commissioner's decision denying benefits to the agency for rehearing, was an appealable final judgment under 28 U.S.C. 1291. That conclusion does not depend on whether it is the Commissioner or the claimant who seeks review in the court of appeals. In either case, a district court's order that is entered pursuant to the fourth sentence of 42 U.S.C. 405(g) ends the litigation before the court and results in the entry of a final, appealable judgment.

B. The court of appeals erred in holding that, although the district court's judgment in this case is final under 28 U.S.C. 1291, petitioner may not appeal the district court's judgment because she successfully obtained an order reversing the Commissioner's decision and remanding for further administrative proceedings. A party has standing to seek judicial review in the court of appeals if the party retains a stake in the outcome of the appeal sufficient to satisfy the requirements of Article III. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 334 (1980). Similarly, the appellant must be "aggrieved" by the final decision of the district court. *Id.* at 333. That rule ensures that a party does not exercise a statutory right of appeal when the decision being appealed has afforded all of the relief sought by the party. *Id.* at 333-334.

Consistent with those principles, petitioner may appeal the district court's sentence-four judgment.

Petitioner has been aggrieved by that judgment insofar as it orders a remand for further rehearing by the agency. In petitioner's view, the district court should have entered, under the fourth sentence of Section 405(g), a judgment "reversing the decision of the Commissioner * * * *without* remanding the cause for a rehearing." 42 U.S.C. 405(g) (emphasis added). Because petitioner seeks an immediate award of benefits without further rehearing by the agency on her application for benefits, petitioner has not prevailed fully upon her asserted claim for relief before the district court.

Petitioner also is aggrieved by the adverse portions of the district court's decision, which rejected her contentions of administrative error concerning the medical opinion of her treating physician, her credibility, and the testimony of the vocational expert who testified adversely to petitioner. A victory in the court of appeals on one or more of the district court's rulings could significantly affect the administrative proceedings on remand concerning petitioner's entitlement to benefits.

C. The policy concerns expressed by the court below do not furnish a basis for carving out an exception to the general rule under 28 U.S.C. 1291 that a party who is aggrieved by the final judgment of a district court has a right of appeal. The courts of appeals will not be unduly burdened with appeals by claimants of sentence-four remand orders. Because of a variety of practical and legal considerations, the vast majority of claimants who obtain sentence-four remand orders are likely to forgo an immediate appeal and pursue administrative proceedings. Given the existing considerations motivating claimants to return initially to the agency for a rehearing on their

applications for benefits, equitable principles of issue preclusion should not be applied rigidly to create incentives for claimants to resort in the first instance to the courts of appeals.

ARGUMENT

THE COURT OF APPEALS HAS JURISDICTION OVER PETITIONER'S CHALLENGE TO THE DISTRICT COURT'S ORDER OF REMAND UNDER THE FOURTH SENTENCE OF 42 U.S.C. 405(g)

A. The District Court's Sentence-Four Judgment Is A Final Decision That Is Appealable Under 28 U.S.C. 1291

The fourth sentence of 42 U.S.C. 405(g) provides that the district court "shall have [the] power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for rehearing." There is no dispute that the district court's order in this case remanding the Commissioner's denial of benefits to the Commissioner for rehearing was entered pursuant to the fourth sentence of 42 U.S.C. 405(g). Pet. App. 4-5, 8 n.1.[6] The eighth sentence of

[6] A sentence-four remand is "entirely different" from a remand under the sixth sentence of Section 405(g). *Sullivan* v. *Finkelstein*, 496 U.S. 617, 626 (1990). Sentence six provides, *inter alia*, that the district court may remand the case to the agency either when (for good cause) the Commissioner requests the remand before filing an answer or when the district court is presented with material new evidence that was not available to the claimant at the time of the prior administrative proceeding. A district court that has granted a sentence-six remand retains jurisdiction of the case while the administrative proceedings are pending. Sentences four and six of 42 U.S.C. 405(g) provide the exclusive means by which a district court reviewing a final agency decision denying Social Security benefits may remand the case to the agency for further proceedings. See generally *Melkonyan* v. *Sullivan*, 501 U.S. 89, 97-98 (1991). We have been informed by SSA that the vast majority of remands ordered under Section 405(g) are entered pursuant to sentence four.

Section 405(g) in turn provides that such a judgment "shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions." The express terms of those provisions confirm that the district court's order of remand in this case was a final decision appealable under 28 U.S.C. 1291.

1. In *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), this Court held that the Secretary of Health and Human Services could appeal immediately an order entered under sentence four of Section 405(g) that set aside the Secretary's denial of benefits (in the process essentially holding invalid the regulations on which the Secretary had relied in denying benefits) and remanded the cause to the Secretary for further proceedings on the merits of the claim without regard to the challenged regulations. *Id.* at 624. This Court explained that a contrary ruling would produce an anomalous result: "should the Secretary on remand undertake the inquiry mandated by the District Court and award benefits, there would be grave doubt * * * whether he could appeal his own order." *Id.* at 625. The Court also noted that it "express[ed] no opinion about appealability" where "the person seeking judicial review * * * seek[s] to appeal on the

ground that broader relief should have been granted by the district court." *Id.* at 623 n.3.[7]

Nonetheless, the Court did not limit its reasoning in *Finkelstein* concerning the finality of sentence-four remand orders to circumstances in which judicial review might otherwise be foreclosed. To the contrary, the Court focused on the express language of Section 405(g) and found that it categorically provides that the district court's action under sentence four is a final judgment and appealable as such under 28 U.S.C. 1291. 496 U.S. at 625.

The Court explained that the use of the term "a civil action" in the first sentence of Section 405(g) "suggests that at least in the context of § 405(g), each final decision of the Secretary will be reviewable by a separate piece of litigation." 496 U.S. at 625. The Court also relied on the fact that a sentence-four remand results in a "judgment," and, under sentence eight of Section 405(g), that judgment "shall be final." *Ibid.* Accordingly, the Court concluded that "the fourth sentence directs the entry of a *final, appealable* judgment even though that judgment may be accompanied by a remand order." *Id.* at 629 (emphases added); see also *id.* at 628 ("'[F]inal judgments' are at the core of matters appealable under § 1291, and

[7] In reserving the question of whether a claimant could appeal a district court's remand order, the Court cited *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968). In *Bohms*, a claimant had sought appellate review of a district court's decision remanding the case for further proceedings under the sixth sentence of 42 U.S.C. 405(g). 381 F.2d at 284 n. 1, 286. See note-6, *supra*. In an opinion by then-Circuit Judge Blackmun, the court dismissed the claimant's appeal for lack of a final judgment under 28 U.S.C. 1291. *Bohms*, 381 F.2d at 285-286.

respondent does not contest the power of Congress to define a class of orders as 'final judgments' that by inference would be appealable under § 1291. This is what Congress has done in the fourth sentence of § 405(g).") (citation omitted).[8]

In *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), the Court reiterated *Finkelstein*'s conclusion that "'each final decision of the Secretary [is] reviewable by a *separate* piece of litigation,' and a sentence-four remand order '*terminate[s]* the civil action' seeking judicial review of the Secretary's final decision." *Id.* at 299 (quoting *Finkelstein*, 496 U.S. at 624-625). The Court in *Schaefer* held that the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(B), which must be filed "within thirty days of final judgment in the action," begins immediately upon expiration of the time for an appeal of a

[8] In addition to relying on the language of 42 U.S.C. 405(g), we argued in *Finkelstein* that the finality of a district court's order of remand for further administrative proceedings is analogous to this Court's implicit recognition of jurisdiction to review remand orders from the courts of appeals to administrative agencies under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which authorizes this Court to review "final judgment[s]" of the courts of appeals, 28 U.S.C 2350. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535-536 (1978); *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). We similarly argued that our position is consistent with general principles of judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, under which an appellate court may review a decision that finally rejects a particular agency decision and remands all matters before the court to an official in another Branch of government who is responsible for administering the government program. See *Finkelstein*, 89-504 U.S. Br. at 29-30, 34-35; 89-504 U.S. Reply Br. at 12-14.

sentence-four remand order and not upon the completion of the administrative proceedings on remand. 509 U.S. at 298. In so holding, the Court rejected the notion that the fourth sentence of Section 405(g) permits a court to "postpone" entry of a final judgment and "retain jurisdiction pending completion of the administrative proceedings." *Id.* at 297.[9]

2. Under the express terms of sentences four and eight of Section 405(g), as well as under this Court's decisions in *Finkelstein* and *Schaefer*, the finality of a district court's judgment entered pursuant to sentence four does not depend on whether the appeal is filed by the Commissioner or the claimant. Although *Finkelstein* discussed the practicalities involved when the government is aggrieved by a sentence-four remand order, see 496 U.S. at 625, the Court did not state that the government may appeal only where a practical need exists. Moreover, the Court in *Finkelstein* did not rely on the alternative "collateral order" theory that was also advanced by the government, see *id.* at 632 (Blackmun, J., concurring in the judgment), which would more evidently

[9] Lower courts have concluded that a remand for further administrative proceedings results in a final judgment in settings other than Section 405(g). See *Travelstead* v. *Derwinski*, 978 F.2d 1244, 1248 (Fed. Cir. 1992) (decision by Court of Veterans Appeals remanding to Board of Veterans' Appeals under 38 U.S.C. 7261 is a final, appealable order); *Monongahela Valley Hospital, Inc.* v. *Sullivan*, 945 F.2d 576, 586 (3d Cir. 1991) (district court decision remanding to Secretary of HHS under Medicare Act, 42 U.S.C. 1395oo(f)(1), is a final, appealable order); see also *Rueda-Menicucci* v. *INS*, 132 F.3d 493, 495 (9th Cir. 1997) (permitting party to seek fees under EAJA after obtaining a final order of remand to Board of Immigration Appeals). See also note 8, *supra*.

have afforded a right of appeal only to the Commissioner. Instead, the court concluded in *Finkelstein* that a remand under the fourth sentence of Section 405(g) terminates the litigation and results in the entry of a final, appealable judgment. *Id.* at 624-629; see also *Schaefer*, 509 U.S. 297-298.

In the present case, the district court held that although the Commissioner had substantial evidence for some of his findings, Pet. App. 22-24, he had not sustained his burden of demonstrating that petitioner could perform a type of employment existing in the national economy, *id.* at 24-25. The court then "remanded to the [Commissioner] for further proceedings" consistent with the court's opinion, *id.* at 25, and entered a "judgment" to that effect, *id.* at 14. That judgment "terminated the civil action challenging the [Commissioner's] final determination that [the claimant] was not entitled to benefits, set aside that determination, and finally decided" the contentions raised by petitioner. *Finkelstein*, 496 U.S. at 625. Further, if the Commissioner's decision on remand again denies the claimant's application for benefits, that decision will be subject to judicial review in a "separate piece of litigation" instituted by the claimant pursuant to Section 405(g). *Id.* at 625. Thus, as the court of appeals itself recognized, "to conclude that a sentence-four remand is not final for the claimant is analytically untidy; it is flatly inconsistent with the Supreme Court's insistence in *Finkelstein* that a sentence-four remand terminates the civil action." Pet. App. 9-10.

Moreover, it is clear that, under *Finkelstein*, the Commissioner could have sought appellate review of the district court's order in this case on the ground that the district court erroneously held that the Com-

missioner lacked substantial evidence to conclude that petitioner could perform other jobs that exist in the national economy. See *Kendrick* v. *Shalala*, 998 F.2d 455, 458 (7th Cir. 1993). If a sentence-four remand is a "final, appealable judgment" (*Finkelstein*, 496 U.S. at 629) as to only the Commissioner, however, petitioner could not have filed a cross-appeal to assert legal errors in the district court's final decision or otherwise to alter the court's judgment in the claimant's favor. Cf. *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995) (leaving open question "whether or when it may be proper for court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable"). Nothing in the language of Section 405(g) supports that anomalous and inequitable result. Indeed, the language of the fourth and eighth sentences of Section 405(g) compels the contrary conclusion that "[t]he civil action ending in a sentence-four remand * * * must be 'final,' in a formalistic sense, for all parties to it." Pet. App. 10.

B. Petitioner May Appeal Because She Is Aggrieved By The District Court's Judgment

Although the court of appeals recognized the finality of the district court's judgment, it nonetheless dismissed petitioner's appeal on the grounds that "[a] prevailing party normally may not appeal the decision in its favor" and that "[t]here can be little doubt that a claimant 'prevails' * * * when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed." Pet. App. 10. In our view, that principle is framed too broadly, and the court of appeals erred in applying it to dismiss the appeal in this case.

1. Under the eighth sentence of 42 U.S.C. 405(g), a sentence-four final judgment is subject to judicial review "in the same manner as a judgment in other civil actions." Thus, proceedings under that provision are subject to general principles of appellate review, including the requirement that a party have standing to appeal. See generally 20 *Moore's Federal Practice* § 303.10 (3d ed. 1997); 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3902 (2d ed. 1992).[10]

This Court has observed that, "[o]rdinarily, only a party aggrieved by a judgment or order of a district

---

[10] There can be no doubt that petitioner possessed Article III standing to bring this action in federal district court in the first instance, because the final decision of the Commissioner denied the benefits to which she claimed she was entitled. This Court has held that a person who has intervened in a case brought by someone else must independently satisfy Article III standing requirements in order to appeal a judgment. *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1067 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."); *Diamond* v. *Charles*, 476 U.S. 54, 62-69 (1986); *Bryant* v. *Yellen*, 447 U.S. 352, 368 (1980). Here, however, petitioner is the original plaintiff, and she had standing to invoke the jurisdiction of the district court in the first instance. In any event, there can be no doubt that petitioner satisfies whatever further Article III standing requirement there may be for an appeal by a plaintiff, because the district court's final judgment, like the Commissioner's final decision, did not order an immediate award of the benefits she claims. In these circumstances, petitioner clearly has "a continuing stake in the outcome of the appeal." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 (1980); see also *Arizonans For Official English*, 117 S. Ct. at 1067 ("litigant [must] possess 'a direct stake in the outcome' ") (quoting *Diamond* v. *Charles*, 476 U.S. at 62).

court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980); see also *INS* v. *Chadha*, 462 U.S. 919, 930 (1983); *Perez* v. *Ledesma*, 401 U.S. 82, 87 n.3 (1971); *Gunn* v. *University Comm. to End the War in Vietnam*, 399 U.S. 383, 390 n.5 (1970); *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). The rule that a fully prevailing party may not appeal its victory is "derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art[icle] III." *Roper*, 445 U.S. at 333-334. That rule also is consistent with the general principle that appellate proceedings are confined to "reviews [of] judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (internal quotation marks omitted) (dismissing writ of certiorari as improvidently granted because state court judgment "was entirely in the State's favor").

In *Deposit Guaranty National Bank* v. *Roper*, this Court found that credit card holders could appeal a district court's denial of class certification under Federal Rule of Civil Procedure 23, even though the defendant had tendered to the named plaintiffs the maximum amount each could have recovered and the district court had entered judgment in the plaintiffs' favor. 445 U.S. at 332-336. The plaintiffs had sought appellate review of the denial of class certification in order to shift part of the litigation costs to other class members. *Id.* at 334 n.6, 336. The Court found that the plaintiffs' interest in the appeal was

sufficient to confer Article III standing to appeal, *id.* at 336, and that the denial of class certification was a "procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment," *ibid.* The Court therefore held that "[t]he denial of class certification stands as an adjudication of one of the issues litigated," and the plaintiffs, "who assert a continuing stake in the outcome of the appeal, were entitled to have this portion of the District Court's judgment reviewed." *Ibid.*

More recently, in *United States* v. *Jose*, 117 S. Ct. 463 (1996), this Court held in a per curiam opinion that the Ninth Circuit had jurisdiction to entertain an appeal by the Internal Revenue Service (IRS) of a district court's final order that enforced two IRS summonses but placed restrictions on the circulation within the agency of the summoned documents. The Ninth Circuit had held that "the IRS's appeal is not ripe for review," reasoning that, because the IRS had neither attempted to disclose any documents nor instituted a criminal investigation, "any detrimental impact the district court's order may have on the IRS's investigation is, at this time, purely speculative." 117 S. Ct. at 464-465 (quoting *United States* v. *Jose*, 71 F.3d 1484, 1485 (9th Cir. 1995)).

This Court reversed, holding that the IRS could "gain access to appeal from the District Court's final decision to the extent that it disfavored the Service." 117 S. Ct. at 465. The Court explained that the district court's final order "is a decision dispositively granting in part and denying in part the remedy requested. The IRS prevailed to the extent that the District Court enforced the summons. The Service did not prevail to the extent that the District Court imposed a condition." *Ibid.* In holding that the

district court's order was a final, appealable order, the Court also stated that "appellate jurisdiction over final decisions does not turn on which side prevailed in the District Court," and that "[f]inality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court." *Ibid.*

Although the Court's decision in *Jose* framed the issues in that case in terms of ripeness, because that was the doctrine "interject[ed]" by the court of appeals, 117 S. Ct. at 465, the Court's decision necessarily assumed that the IRS had standing to appeal because the agency was aggrieved by the district court's order. The Court in *Jose* observed that it previously had granted a writ of certiorari when the government similarly had been "[a]ggrieved" by a conditional enforcement order upheld by the Ninth Circuit. *Ibid.* Noting that the Court had affirmed the court of appeals' decision in that case by an equally divided Court, *ibid.* (citing *United States* v. *Zolin*, 491 U.S. 554, 561 (1989)), the Court explained that "[w]e hardly would have done so had we considered the matter unfit for review," *ibid.*

This Court's decision in *Jose* therefore strongly supports the proposition that a party may appeal a district court's decision that "dispositively * * * den[ies] in part the remedy requested." 117 S. Ct. at 465. Indeed, lower courts expressly have recognized the principle that an otherwise prevailing party may appeal any portion of a court's final decision on which she did not prevail. See, *e.g.*, *United States* v. *McAndrews*, 12 F.3d 273, 278 (1st Cir. 1993) (defendant could appeal adequacy of sentence reduction under Federal Rule of Criminal Procedure 35(b); court reasoned that "[a] prevailing party dissatisfied with the quantum of relief obtained—say,

a personal injury plaintiff who receives a favorable liability finding but a paltry damage award — ordinarily can seek appellate review"); *Disher* v. *Information Resources, Inc.* 873 F.2d 136, 138 (7th Cir. 1989) (a "dismissal without prejudice, by subjecting the defendant to the risk * * * of further litigation, is not entirely in the defendant's favor any more than a judgment for $1 million would be entirely in favor of a plaintiff who believed he was entitled to a judgment for $1,236,000")[11]; *LaBuhn* v. *Bulkmatic Transport Co.*, 865 F.2d 119, 121-122 (7th Cir. 1988) ("[o]bviously you can't appeal from a decision that is entirely in your favor. * * * But you can appeal from the parts of a generally favorable order that are unfavorable to you").[12]

2. Consistent with the above principles, petitioner is aggrieved by, and therefore may appeal, the district

---

[11] But cf. *Parr* v. *United States*, 351 U.S. 513 (1956) (order granting government's motion to dismiss indictment without prejudice not appealable by defendant).

[12] Courts of appeals routinely entertain appeals by parties who prevailed on the merits but were nonetheless aggrieved because they did not obtain all of the relief they requested. See, *e.g.*, *Gargoyles, Inc.* v. *United States*, 113 F.3d 1572 (Fed. Cir. 1997) (prevailing party recovered reasonable royalty but was denied lost profits); *Castle* v. *Rubin*, 78 F.3d 654 (D.C. Cir. 1996) (per curiam) (prevailing party awarded partial back pay but denied reinstatement and front pay); *La Plante* v. *American Honda Motor Co.*, 27 F.3d 731 (1st Cir. 1994) (prevailing party awarded compensatory damages but not punitive damages); *Graziano* v. *Harrison*, 950 F.2d 107 (3d Cir. 1991) (prevailing party awarded damages but denied attorney's fees); *Ragen Corp.* v. *Kearney & Trecker Corp.*, 912 F.2d 619 (3d Cir. 1990) (prevailing party denied consequential damages); *Carrigan* v. *Exxon Co.*, 877 F.2d 1237 (5th Cir. 1989) (prevailing party awarded damages but not injunctive relief).

court's judgment under the fourth sentence of 42 U.S.C. 405(g). The district court "ordered that this case be remanded to the [Commissioner] for further proceedings" consistent with the district court's opinion. Pet. App. 25; see also *id.* at 14 (final judgment remanding case). Petitioner, however, sought outright reversal of the Commissioner's denial of disability benefits and an affirmative determination that she was entitled to an immediate award of benefits; only as alternative and lesser relief did she seek a remand for further administrative proceedings on the merits of her claim. C.A. E.R. 242. Indeed, the fourth sentence of Section 405(g) expressly authorizes a district court to enter "a judgment * * * reversing the decision of the Commissioner for Social Security with *or without* remanding the cause for a rehearing." 42 U.S.C. 405(g) (emphasis added).[13] Al-

[13] Before the court of appeals' decision in this case, the Ninth Circuit had entertained appeals brought by claimants challenging a sentence-four remand order on the ground that the district court should have determined that the claimant was entitled to an immediate award of benefits without further rehearing before the agency. See *Springer* v. *Chater*, 91 F.3d 155 (1996) (unpublished disposition) (affirming district court's order of remand); *Waggoner* v. *Chater*, 81 F.3d 171 (1996) (unpublished disposition) (modifying district court's order of remand); *Gifford* v. *Chater*, 77 F.3d 488 (1996) (unpublished disposition) (holding that claimant "is entitled to an immediate finding of disability and award of benefits" when ALJ failed to provide reasons for rejecting credibility of claimant's pain testimony and reports of examining physician); *Atkins* v. *Chater*, 70 F.3d 529 (1995) (affirming district court's order of remand); *Weaver* v. *Chater*, 67 F.3d 310 (1995) (unpublished disposition) (reversing and remanding for an award of benefits based on opinions of treating physician); *Joyal* v. *Department of Health & Human Servs.*, 37 F.3d 1505 (1994) (unpublished disposition) (reversing district court's order for further proceedings and remanding for an award of benefits); *Buzzard* v. *Shalala*, 36 F.3d 1102 (1994) (unpublished disposition) (affirming district court's order of remand).

though petitioner clearly "prevailed" in the sense that she obtained a reversal and remand for further administrative proceedings on the merits, she did not prevail to the extent that she requested a reversal with an outright award of benefits.[14] Petitioner plainly is aggrieved by the district court's judgment "dispositively * * * denying in part the remedy requested," *Jose*, 117 S. Ct. at 465, and therefore may seek appellate review to alter the terms of that judgment.

Furthermore, any sentence-four judgment that includes a remand necessarily comprises the court's disposition of legal disputes raised by the parties, and that judgment will affect the character of the further proceedings on the merits on remand. See *FPC* v. *Pacific Power & Light Co.*, 307 U.S. 156, 160 (1939)

[14] Under this Court's decision in *Schaefer*, 509 U.S. at 300-302, petitioner is a "prevailing party" for purposes of an award of attorney's fees under EAJA, 28 U.S.C. 2412(d)(1)(A). As the court of appeals recognized, however, "the status of prevailing party for purposes of attorney's fees * * * does not automatically equate with status as prevailing party for purposes of appeal." Pet. App. 11. For the latter purpose, the issue is not whether the party in some fashion "prevailed" in the district court, but whether she is "aggrieved" by that court's judgment. For example, if the district court had resolved every legal issue in this case on the merits in petitioner's favor but had determined that petitioner was entitled to some but not all of the benefits she had sought, petitioner would qualify as a "prevailing party" for purposes of attorney's fees, but she also would have a right to appeal the judgment to seek additional benefits. See note 12, *supra*; cf. 20 C.F.R. 404.902(c) (Commissioner's determination of amount of disability benefits is seperately subject to administrative and judicial review).

("The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. [A] judgment rendered will be a final and indisputable basis of action between the commission and the defendant.") (internal quotation marks omitted); see also *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) ("On review the court may * * * correct errors of law and on remand the Commission is bound to act upon the correction.").

Here, the district court expressly remanded the cause for further proceedings before the agency "in accordance with" the court's decision. Pet. App. 25. That decision rejected petitioner's contentions that the ALJ erred (1) in rejecting the medical opinion of petitioner's treating physician regarding the number of hours she could work each day (*id.* at 22-23); (2) in finding that petitioner's allegations of pain were not credible (*id.* at 23-24); and (3) in posing questions to a vocational expert about petitioner's ability to work with specified medical impairments without incorporating into the questions the report of petitioner's treating physician regarding the extent of those impairments (*id.* at 24). Petitioner will be adversely affected by those rulings in the course of further proceedings, because the ALJ who rehears the cause will be free to do so "in accordance with" the court's opinion, without revisiting the treating physician, pain, and vocational expert issues. *Id.* at 25.

A treating physician's medical opinion and the subjective testimony of the claimant regarding pain are often critical factors in determining whether a claimant is disabled and entitled to benefits. See 42 U.S.C. 423(d)(5); 20 C.F.R. 404.1527 (standards for evaluating opinion of treating physician); 20 C.F.R. 404.1529 (standards for evaluating claimant's symptoms, including pain); see also note 3, *supra*. Moreover, courts have held that the Commissioner's decision to reject either the medical opinion of the claimant's treating physician or the testimony of the claimant herself must be supported by substantial evidence. See, *e.g.*, *Chavez* v. *Department of Health & Human Servs.*, 103 F.3d 849, 853 (9th Cir. 1996); *Bean* v. *Chater*, 77 F.3d 1210, 1213-1214 (10th Cir. 1995); *Barrett* v. *Shalala*, 38 F.3d 1019, 1023-1024 (8th Cir. 1994). Thus, a resolution in petitioner's favor by the court of appeals on one or more of petitioner's contentions of error by the ALJ could significantly affect whether the ALJ awards petitioner benefits on remand.[15]

To be sure, as the court of appeals observed (Pet. App. 10), the district court's remand might ultimately "result in an award of all of the benefits claimed." The district court's remand order, however, deprives petitioner of the immediate and certain benefits to which she would now be entitled if the district court had granted her the outright reversal she had re-

[15] It was petitioner's contention in the court of appeals that, but for the district court's adverse rulings, petitioner would be entitled to an immediate award of benefits without further consideration by the agency. See Pet. C.A. Br. 21-31. The Commissioner disputes that contention, on the grounds that the ALJ's rulings were based on substantial evidence (see Gov't C.A. Br. 14-22) and that, if the court of appeals found to the contrary, the appropriate relief would be a remand to the agency to reweigh the evidence in light of the court of appeals' decision. See *infra*, pp. 28-29. Regardless of the ultimate outcome of that dispute, however, petitioner at least has standing to argue on appeal both that she is entitled to an immediate award of benefits or, in the alternative, that she is entitled to a remand on more favorable terms than those provided by the district court.

quested. The fact that she might receive benefits later, after further proceedings on remand, does not detract from the fact that she will not receive benefits now under the district court's judgment. Thus, under principles generally applicable to "other civil actions," 42 U.S.C. 405(g), petitioner is sufficiently aggrieved by the district court's disposition of this case that she is entitled to appellate review of the judgment. See *Jose*, 117 S. Ct. at 465 ("Nor is the IRS required to provide notice of its intention to transfer documents internally, for this is the very condition the IRS seeks to attack on appeal.").

C. The Practical Consequences Of A Claimant's Appeal Of A District Court's Final Judgment Remanding To The Commissioner Are Limited And Do Not Furnish A Basis For An Exception To Appealability

1. The Ninth Circuit concluded that it "ought not to entertain [petitioner's] present appeal" because "[r]eview at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require [the court of appeals] to adjudicate on less than a full record." Pet. App. 11. Although the court of appeals' concerns cannot be rejected out of hand, we believe that they do not furnish a basis for carving out such appeals by Social Security claimants from the usual rule under 28 U.S.C. 1291 that a party aggrieved by the final judgment of a district court is entitled to take an appeal.

In the first place, appeals of sentence-four remand orders by claimants are likely to be rare, because a district court's judgment holding that the Commissioner's decision is legally erroneous and remanding

the matter to the Commissioner for further proceedings represents a substantial, albeit partial, victory for a claimant.[16] The further administrative proceedings ordered by the district court may then offer a claimant substantial strategic or practical advantages. For example, the claimant is likely on remand to have an opportunity to present to the agency additional medical evidence or testimony in support of her application for benefits. Additionally, a claimant who is awarded and accepts a sentence-four remand may immediately seek attorney's fees and expenses under EAJA, see *Schaefer*, 509 U.S. at 303, while an appeal by the claimant at that point could delay the receipt of fees and expenses until after appellate review is completed.[17]

Moreover, resolution of the ultimate issue of the claimant's entitlement to benefits may occur more quickly through the administrative proceedings.

---

[16] We are aware of only two other reported lower court decisions in which a claimant has appealed a sentence-four remand order. *Nguyen* v. *Shalala*, 43 F.3d 1400, 1402 n.2 (10th Cir. 1994); *Atkins* v. *Chater*, *supra* (entertaining appeal without discussion of jurisdiction). It is our understanding that petitioner's counsel was involved in *Atkins*, as well as all of the unpublished decisions cited in note 13, *supra*.

[17] For several reasons, a district court might wish to defer its ruling on a fee application pending the outcome of appellate proceedings. The claimant may lose her status as a prevailing party on appeal, see *Nguyen*, 43 F.3d at 1403-1404, or the court of appeals' decision may bear on whether the government's position was substantially justified under 28 U.S.C. 2412(d). Moreover, because the claimant may be entitled to additional fees incurred on appeal, see *Jean* v. *Nelson*, 863 F.2d 759, 770 (11th Cir. 1988), aff'd on other grounds, 496 U.S. 154 (1990), the district court may want to postpone its ruling until after the claimant has submitted all potential fee applications.

Sentence-four remand orders are directly sent to SSA's Appeals Council for immediate resolution or assignment to an ALJ. 20 C.F.R. 404.983. We have been informed by SSA that the ALJ issues a decision, on average, within a year. More significantly, claimants historically have very good prospects of fully prevailing on remand. Thus, we have been informed by SSA that, following additional development of the record on remand, benefits are awarded in approximately 60% of Social Security cases remanded to the Commissioner.

The frequency with which claimants may be expected to appeal district court decisions is reduced further by several additional factors. For instance, the claimant might risk a cross-appeal by the Commissioner that could eviscerate the claimant's partial victory of remand ordered by the district court. And a claimant likely will face an uphill battle on appeal, since the Commissioner and the district court have each concluded that the existing administrative record was insufficient to warrant an immediate award of benefits.

Finally, even if the court of appeals were to find that the district court's legal rulings adverse to the claimant were erroneous, the court of appeals might nevertheless conclude that it should order a remand to the agency for further administrative proceedings on the merits, rather than reverse the Commissioner's decision outright and direct an award of benefits. See, *e.g.*, *Ingram* v. *Chater*, 107 F.3d 598, 605 (8th Cir. 1997); see also *Ragland* v. *Shalala*, 992 F.2d 1056, 1060 (10th Cir. 1993) (decision whether to remand for additional evidence or simply to award benefits is within court's discretion); accord *Stone* v. *Heckler*, 761 F.2d 530, 533 (9th Cir. 1985); *Podedworny* v. *Harris*, 745 F.2d 210, 221 (3d Cir. 1984). Indeed, courts of appeals order immediate awards of benefits only in limited circumstances. See, *e.g.*, *Taylor* v. *Chater*, 118 F.3d 1274, 1279 (8th Cir. 1997) ("record overwhelmingly supports a finding of disability"); *Faucher* v. *Secretary of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994) ("all essential factual issues have been resolved"); *Davis* v. *Shalala*, 985 F.2d 528, 534 (11th Cir. 1993) ("cumulative effect of the evidence establishes disability without any doubt"); *Rodriguez* v. *Bowen*, 876 F.2d 759, 763 (9th Cir. 1989) ("no useful purpose would be served by further administrative proceedings" or "remand would only delay the receipt of benefits"); *Gilliland* v. *Heckler*, 786 F.2d 178, 184 (3d Cir. 1986) ("the administrative record * * * has been fully developed and * * * substantial evidence * * * as a whole indicates that the Claimant is disabled and entitled to benefits"); *Parker* v. *Harris*, 626 F.2d 225, 235 (2d Cir. 1980) ("record provides persuasive proof of disability and a remand for further evidentiary proceedings would serve no purpose").

For the foregoing reasons, it is far more likely that claimants generally will accept the remand order and seek to adduce additional evidence and urge a different weighing of the record in the administrative proceedings. Thus, the practical consequences of appellate jurisdiction over claimant appeals should be limited.

2. Nor in our view should the availability of appellate review prompt claimants to appeal adverse findings in the district court's decision out of fear that they will be precluded from contesting them in a subsequent proceeding under Section 405(g). Although equitable principles of issue preclusion normally apply when appellate "review is available but

is not sought" (Restatement (Second) of Judgments § 28 comment a (1982)), those principles should not, in our view, be applied to force claimants to take appeals they otherwise would not take simply to preserve their challenges to certain aspects of the district court's decision, when existing practical and policy considerations already counsel claimants not to seek an immediate appeal. Indeed, the rigid imposition of principles of issue preclusion would frustrate their purpose to guard against unnecessary litigation.

a. In holding that it "ought not to entertain [the] present appeal," Pet. App. 11, the court of appeals rejected petitioner's contention that she would be barred by principles of issue preclusion from contesting the district court's adverse rulings against her in a subsequent judicial proceeding following the administrative proceedings on remand. The court explained that "it is inappropriate to hold [petitioner] to rulings that she was precluded from appealing." *Id.* at 12. That general proposition naturally flows from the court of appeals' refusal to consider petitioner's appeal. See Restatement (Second) of Judgments § 28(1) (1982) (issue preclusion does not apply when "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action"); Wright, Miller & Cooper, *supra*, § 3902, at 84 ("if appeal is denied, preclusion also should be denied").

The court of appeals' conclusion that petitioner's dilemma is "false," Pet. App. 12, however, does not resolve the antecedent question whether petitioner is aggrieved by the district court's judgment, any more than did petitioner's original contention that she must be permitted to appeal the district court's adverse rulings to avoid the effects of preclusion. See

EEOC v. *Chicago Club*, 86 F.3d 1423, 1431 n.2 (7th Cir. 1996) (noting "potential circularity" of a requirement that a decision must bar a party from readjudication in order for that party to be aggrieved by the decision); see also *Concerned Citizens of Cohocton Valley, Inc.* v. *New York Dep't of Envt'l Conserv.*, 127 F.3d 201, 205 (2d Cir. 1997); *LaBuhn*, 865 F.2d at 122. Here, petitioner is entitled to appeal the court's remand order, not because of putative preclusive effects, but because petitioner challenges a final judgment that did not grant her all the relief she requested.

The court of appeals also erred in concluding that the district court's rulings that are adverse to petitioner are "unnecessary to the remand" and thus not "essential to the judgment." Pet. App. 12-13. The court relied (*id.* at 13) on comment h to Section 27 of the Restatement (Second) of Judgments, which explains that determinations not essential to the judgment "have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made."[18] The district court's

---

[18] The court of appeals recited (Pet. App. 13) an illustration to Section 27, which states that an alleged trademark infringer is not precluded from defending an infringement action on invalidity grounds even though in a prior proceeding a court found a trademark valid because that it was not infringed. Restatement (Second) of Judgments § 27 comment h, illust. 14 (1982). The facts of the prior proceeding so described, however, are virtually identical to the facts in *Electrical Fittings*, in which the Court *permitted* an appeal urging the court of appeals to remove the finding of validity from the district court's decree. 307 U.S. at 242-243; see also *Roper*, 445 U.S. at 335-336 n.7 (discussing *Electrical Fittings* and explaining that "petitioners could take the appeal to correct this error because there had been an adverse decision on a litigated issue, they

rulings adverse to petitioner, however, are not dicta but "stand[] as an adjudication of one of the issues litigated." *Roper*, 445 U.S. at 336; see also *Electrical Fittings*, 307 U.S. at 242. As discussed above, petitioner contends on appeal that, had the district court ruled to the contrary on one or more of the issues that she sought to raise on appeal, the administrative record in this case warranted a judgment of reversal without a remand for further administrative proceedings on the merits. See Pet. C.A. Br. 18, 21, 27-28, and 35. Because the judgment is not fully favorable to petitioner (in light of the remand for further proceedings on the merits), petitioner is entitled to challenge those rulings that, in her submission, underlie the unfavorable portion of the judgment. Compare *California* v. *Rooney*, 483 U.S. at 311.

b. Despite the foregoing errors in the court of appeals' analysis, we nonetheless believe that the availability of the option to appeal should not preclude claimants who choose not to exercise that option from challenging the district court's findings in a subsequent judicial proceeding. Issue preclusion, or collateral estoppel, is "an equitable doctrine resting within the [courts'] broad discretion." *JM Muniz, Inc.* v. *Mercantile Texas Credit Corp.*, 833 F.2d 541, 543 (5th Cir. 1987); cf. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 331 (1979) (courts have "broad discretion" to apply offensive collateral estoppel). As a judge-made doctrine, it is designed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing

---

continued to assert an interest in the outcome of that issue, and for policy reasons this Court considered the procedural question of sufficient importance to allow an appeal").

inconsistent decisions, encourage reliance on adjudication." *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984) (quoting *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)); see also *Parklane Hosiery Co.*, 439 U.S. at 326 (collateral estoppel "protect[s] litigants from the burden of relitigating an identical issue with the same party or his privy and promot[es] judicial economy by preventing needless litigation").

Concerns of judicial efficiency and the settled expectations of litigants, however, are not implicated when a claimant forgoes immediate appellate review of a sentence-four judgment containing a remand order, and instead follows the district court's order and seeks redress from the agency. If the claimant is unsuccessful on remand, and she files a subsequent action under Section 405(g) seeking judicial review of the Commissioner's new decision, no sufficient purpose would be served by altogether barring the claimant from raising issues resolved against her in the first district court action.[19] Although the second round of judicial review would be a new civil action in court, there is but one underlying administrative proceeding before the Commissioner on but one application for benefits. In those circumstances, the second round of judicial review neither presents a risk of inconsistent judicial decisions nor burdens the parties or the courts with vexatious litigation.[20]

---

[19] The district court, in the second round of judicial review, may apply law-of-the-case type principles. See Pet. App. 12; *Agostini* v. *Felton*, 117 S. Ct. 1997, 2017 (1997).

[20] A system in which claimants are permitted to forgo an immediate appeal without fear of preclusive effects also is consistent with a recognized exception to issue preclusion for an issue of law when "a new determination is warranted in order * * * to avoid inequitable administration of the laws." Re-

Additionally, to the extent that a rule of issue preclusion would encourage litigants to seek immediate judicial review of sentence-four remand orders, the application of such a rule would promote unnecessary appellate litigation. As previously discussed (pp. 26-29, *supra*), most remanded claimants will forgo an appeal in favor of further administrative proceedings, because that is the fastest and most effective path to obtaining Social Security benefits. By contrast, a fixed rule of preclusion would create undesirable incentives to avoid administrative proceedings on remand, even though such proceedings can provide the most efficient means of resolving a given dispute. For those reasons—and in light of the special attributes of judicial review of agency action, in which the agency has primary jurisdiction and the matter ordinarily should be returned to the agency if the court finds a flaw in its decision, see *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *Pottsville Broadcasting Co.*, 309 U.S. at 141—the relevant policy considerations do not, on balance, support application of issue preclusion. See generally *Parklane Hosiery Co.*, 439 U.S. at 326-333 (discussing centrality of policy concerns in determining scope of collateral estoppel doctrine); *Mendoza*, 464 U.S. at 159-162 (discussing policy concerns counseling against applying non-mutual collateral estoppel to the government).

---

statement (Second) of Judgments § 28(2) (1982). It would be unfair to require claimants to seek immediate appellate review of sentence-four remand orders when the most expeditious avenue of obtaining benefits may be pursuing an administrative proceeding.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
LISA SCHIAVO BLATT
Assistant to the Solicitor General
WILLIAM KANTER
MARY K. DOYLE
Attorneys

FEBRUARY 1998

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:[1]

> [1] Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business, within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. [5] The findings of the

---

[1] Because of the length of 42 U.S.C. 405(g), we have inserted numbers in brackets to identify its separate sentences.

Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. [7] Such additional or modified findings of fact and

decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

2. Section 1291 of Title 28 of the United States Code provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Supreme Court, U.S.
FILED
APR 13 1998
CLERK

No. 97-5737

In the Supreme Court of the United States

OCTOBER TERM, 1997

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT IN SUPPORT OF REVERSAL

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
1. The district court's order remanding the cause to the Commissioner is a final judgment for purpose of appeal under 42 U.S.C. 405(g) and 28 U.S.C. 1291	2
2. Petitioner is aggrieved by the district court's judgment	4
3. Petitioner does not merely challenge statements in the district court's opinion that are unnecessary to its judgment	14
4. The policy considerations advanced by amicus do not warrant an implied exception to the statutory right of appeal	17

TABLE OF AUTHORITIES

Cases:	Page
Allstate Ins. Co. v. *A.A. McNamara & Sons, Inc.*, 1 F.3d 133 (2d Cir. 1993)	15
Baker v. *General Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), rev'd on other grounds, 118 S. Ct. 657 (1998)	12
Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 (1955)	18
Bohms v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968)	3
California v. *Rooney*, 483 U.S. 307 (1987)	15
Chan v. *Korean Air Lines Ltd.*, 490 U.S. 122 (1989)	10
CH2M Hill Central, Inc. v. *Herman*, 131 F.3d 1244 (7th Cir. 1997)	13
DES Litig., In re, 7 F.3d 20 (2d Cir. 1993)	15
Deposit Guaranty Nat'l Bank v. *Roper*, 445 U.S. 326 (1980)	5, 10, 13, 18
Director, OWCP v. *Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1988)	13

Cases—Continued: Page

Electrical Fittings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241 (1939) 10
Faucher v. *Secretary of Health and Human Servs.*, 17 F.3d 171 (6th Cir. 1994) 6
Fort Wayne Books, Inc. v. *Indiana*, 489 U.S. 46 (1989) 11
Jefferson v. *City of Tarrant*, 118 S. Ct. 481 (1997) .. 12
McCarthy v. *Madigan*, 503 U.S. 140 (1992) 18
Melkonyan v. *Sullivan*, 501 U.S. 89 (1991) 8
Nguyen v. *Shalala*, 43 F.3d 1400 (10th Cir. 1994) ... 18
O'Connor v. *Shalala*, 23 F.3d 1232 (7th Cir. 1994) .. 17
Owen-Illinois, Inc. v. *Aetna Cas. & Sur. Co.*, 990 F.2d 865 (6th Cir. 1993) 15
Parr v. *United States*, 351 U.S. 513 (1956) 11, 12, 13
Ricke v. *Armco, Inc.*, 92 F.3d 720 (8th Cir. 1996) ... 10
Shalala v. *Schaefer*, 509 U.S. 292 (1993) 2, 3, 4, 8
Southern Natural Gas Co. v. *FERC*, 877 F.2d 1066 (D.C. Cir. 1989) 6
Star Fin. Servs., Inc. v. *AASTAR Mortgage Corp.*, 89 F.3d 5 (1st Cir. 1996) 7
Steel Co. v. *Citizens for Better Environment*, 118 S. Ct. 1003 (1998) 14
Stripe-A-Zone v. *Occupational Safety and Health & Review Comm'rs*, 643 F.2d 230 (5th Cir. 1981) 13
Sullivan v. *Finkelstein*, 496 U.S. 617 (1990) 2, 3, 4, 8, 9, 12, 18
United States v. *Jose*, 117 S. Ct. 463 (1996) 3, 5, 9, 13
United States v. *Ligori*, 658 F.2d 130 (3d Cir. 1981) 7
United States v. *MacDonald*, 435 U.S. 850 (1978) .. 11
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 12
Yarn Processing Patent Validity Litig., In re, 530 F.2d 83 (5th Cir. 1976) 7

Constitution, statutes and rule: Page

U.S. Const. Amend. VI 11
Administrative Procedure Act, 5 U.S.C. 704 13
Social Security Act, 42 U.S.C. 405(g) ..... *passim*
15 U.S.C. 717r(b) 6
28 U.S.C. 1257(a) 12
28 U.S.C. 1291 ..... 2, 10, 12, 18
28 U.S.C. 1292(a)(1) 10
28 U.S.C. 1292(b) 10
29 U.S.C. 659(c) 13
29 U.S.C. 660(a) 13
33 U.S.C. 921(c) 13
Fed. R. Civ. P. 8(a) 5

Miscellaneous:

C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*:
Vol. 15A (2d ed. 1992) 13
Vol. 16 (2d ed. 1996) 10

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-5737

SANDRA K. FORNEY, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER
OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT IN SUPPORT OF REVERSAL

As we set forth in our opening brief, the district court in this case, pursuant to sentences four and eight of 42 U.S.C. 405(g), entered a final judgment reversing the Commissioner's decision denying petitioner's application for disability benefits, and remanding the cause to the Commissioner for further administrative proceedings on the merits. Although the district court's decision is favorable to petitioner to that extent, petitioner sought greater relief in the form of an outright reversal—a judgment affirmatively finding her entitled to disability benefits, not merely remanding for a rehearing by the Commissioner. That greater form of relief is expressly authorized by the fourth sentence of Section 405(g). Because the district court's decision did not grant

petitioner all of the relief she requested, petitioner is aggrieved by the judgment and may appeal it. Accordingly, the court of appeals erred in dismissing petitioner's appeal for lack of jurisdiction.

The amicus curiae appointed by this Court advances three main arguments in support of the court of appeals' judgment. First, amicus contends that petitioner is not aggrieved by the district court's decision because it affords her part of the relief she requested and does not prevent her from ultimately obtaining benefits. Second, amicus claims that petitioner does not seek to alter the district court's judgment of remand for further proceedings, but seeks solely to correct erroneous statements in the district court's decision that were unnecessary to the court's judgment. Third, amicus argues that policy reasons warrant denial to petitioner of a statutory right of appeal under 28 U.S.C. 1291. Each of those contentions lacks merit, as does petitioner's passing suggestion at the outset that the district court's decision is not a final judgment.

1. The District Court's Order Remanding The Cause To The Commissioner Is A Final Judgment For Purpose Of Appeal Under 42 U.S.C. 405(g) And 28 U.S.C. 1291

Amicus does not seriously dispute that, under the text of Section 405(g) and under this Court's decisions in *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), the court of appeals correctly concluded that the district court's judgment is a "final decision[]" over which "[t]he court[] of appeals * * * shall have jurisdiction." 28 U.S.C. 1291. Nor does amicus dispute that a substantial anomaly would result if this Court were to hold that Section 405(g)'s fourth sentence "directs

the entry of a final, appealable judgment" (*Finkelstein*, 498 U.S. at 629) only with respect to the Commissioner. See *United States* v. *Jose*, 117 S. Ct. 463, 465 (1996) ("appellate jurisdiction over final decisions does not turn on which side prevailed in the District Court").

Instead, amicus questions in a footnote (Br. 10 n.7) whether Congress intended to limit the finality of remand orders to the particular situation presented in *Finkelstein*, in which an agency, which might otherwise be precluded from appellate review, seeks to appeal a district court judgment containing a remand order. Accordingly, amicus contends (*id.* at 11 n.7) that because "there is no compelling practical reason to treat the type of remand order here as final," the Court should apply what amicus asserts is the general rule outside the Social Security context: that remands to an agency are not immediately appealable.[1]

As we explain in our opening brief (Br. 11-16), however, the Court in *Finkelstein* neither limited its reasoning to circumstances in which the government could demonstrate a practical need to appeal nor relied on the "collateral order" theory advanced in the alternative by the government, which would more evidently have afforded a right of appeal only to the

---

[1] In arguing that remands to administrative agencies are interlocutory, amicus cites (Br. 11 n.7) *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968). As we note in our opening brief (Br. 12 n.7), however, the remand at issue in that case was entered pursuant to sentence six and, therefore, was not a judgment made final by the eighth sentence of Section 405(g). See *Schaefer*, 509 U.S. at 297 ("a sentence-four judgment * * * is the *only* judgment authorized by § 405(g)").

Commissioner. To the contrary, the Court found that the express text of the fourth and eighth sentences of Section 405(g) categorically provides that the district court's action under sentence four "*terminate[s]*" the litigation before the court and must result in "the entry of a *final, appealable* judgment even though that judgment may be accompanied by a remand order." 496 U.S. at 625, 629 (emphases added); see also *id.* at 627 (rejecting the argument that the eighth sentence of Section 405(g) "does not compel the conclusion that a judgment entered pursuant to the fourth sentence is immediately appealable"). Since *Finkelstein*, this Court has reiterated without qualification the conclusion that the "plain language" of sentence four directs the entry of a final, appealable judgment. See *Schaefer*, 509 U.S. at 297.

2. Petitioner Is Aggrieved By The District Court's Judgment

Amicus argues that, even if the district court's judgment of remand is final, petitioner may not appeal because she is not aggrieved by the judgment. Amicus reasons, as did the court of appeals (see Pet. App. 10), that the district court's judgment remanding for further proceedings is favorable to petitioner because it provides her with the opportunity on remand to obtain disability benefits. Amicus improperly imports matters involving future proceedings into the calculus of whether an *existing* judgment affords a party all the relief she sought. No one disputes that a sentence-four judgment remanding for further proceedings represents at least a partial victory for the claimant. The question whether petitioner is aggrieved by that judgment, however, depends not on whether the judgment forever precludes petitioner

from obtaining disability benefits in future proceedings before the Commissioner, but whether petitioner "receives *all* that [she] has sought" from the district court itself. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980) (emphasis added). Petitioner may appeal the district court's final judgment as long as the court "den[ied] in part the remedy [she] requested," even if it "dispositively grant[ed] in part" a remedy that petitioner sought. *Jose*, 117 S. Ct. at 465.

Amicus does not dispute that, although the district court entered a judgment "remand[ing] to the [Commissioner] for further proceedings," J.A. 129, the district court did not grant petitioner's request for a "judgment * * * reversing the decision of the Commissioner * * * without remanding the cause for a rehearing." 42 U.S.C. 405(g) (fourth sentence). As such, petitioner was not a fully prevailing party before the district court, is aggrieved by the court's judgment, and has a right of appeal to seek to alter its terms.

a. Arguing to the contrary, amicus first reasons that because petitioner's complaint in the district court alternatively sought a remand for further proceedings and did not express a clear preference for an outright reversal for payment of benefits, "at least as a matter of pleading, [petitioner] got everything she asked for." Br. 14-15 & n.12. That argument lacks merit for a number of reasons.

First, amicus does not suggest that the result in this case would be any different had the claimant drafted her complaint in the manner amicus suggests. Neither the text of Section 405(g) nor the rules of procedure require a claimant to seek only a reversal without a remand for further proceedings, see Federal Rule of Civil Procedure 8(a), or to state in her

complaint the exceedingly obvious proposition that she would prefer an outright reversal and remand for payment of benefits rather than a remand for a rehearing by the Commissioner on the merits.[2]

Second, the authorities relied upon by amicus do not support the proposition that a party may not appeal a judgment that denies the party all of the relief that she sought. Indeed, the majority of the cases simply recognize the unremarkable principle that a party who obtains the *greater* of the requested alternative remedies may not complain that the court erred in not granting the *lesser* form of relief.[3]

---

[2] In *Faucher* v. *Secretary of Health and Human Services*, 17 F.3d 171 (6th Cir. 1994), which amicus cites with approval (Br. 19 n.15), the Secretary appealed a district court's decision that ordered an outright award of benefits under Section 405(g). Although the Secretary conceded that a judgment of reversal was appropriate because of errors in the administrative proceeding, the Secretary nonetheless appealed on the ground that the district court should have remanded for further proceedings before the agency. *Id.* at 173. Thus, the court of appeals implicitly understood that the Secretary was aggrieved by the district court's outright reversal, and thus had a right of appeal to seek a more favorable judgment of remand for further administrative proceedings. A claimant who is *denied* an outright reversal but *granted* a remand for rehearing is no less aggrieved.

[3] Thus, in *Southern Natural Gas Co.* v. *FERC*, 877 F.2d 1066, 1070-1071 (D.C. Cir. 1989), a party sought to challenge a decision of the Federal Energy Regulatory Commission (FERC) accepting a party's primary choice of a tariff but rejecting the party's secondary choice. In rejecting the appeal on the ground that the party was not "aggrieved" under the judicial review provisions of 15 U.S.C. 717r(b), the court explained that "having received from FERC what it presented as its first choice, * * * [the appellant] is not 'aggrieved' * * * by FERC's rejection of its second choice." Other cases relied upon by amicus are similarly inapposite. See *Star Fin. Servs., Inc.* v. *AASTAR Mortgage Corp.*, 89 F.3d 5, 12 (1st Cir. 1996) (when discovery dispute arose over unproduced documents, district court excluded the evidence instead of continuing the trial; on appeal, the court ruled on the merits that the party who had successfully excluded evidence in limine thereafter had waived its objection to the evidence by not objecting to its introduction at trial); *United States* v. *Ligori*, 658 F.2d 130, 134 (3d Cir. 1981) (per curiam) (Higginbotham, J. concurring) (party waived a right to a remand before a different judge when, per the party's request, the judge disregarded government's objection to a motion for reduction of sentence); *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976) (defendant's motion to disqualify plaintiff's counsel became moot when that defendant was dismissed from case).

In any event, the district court's remand order in this case did not grant in full the lesser and alternative relief of remand sought by petitioner. Petitioner sought a remand "for proper evaluation of the evidence or a hearing *de novo*," J.A. 37, based on her four contentions of administrative error. The district court, however, rejected three of those contentions, which relate to the ALJ's rejection of petitioner's testimony about her pain, the report of her treating physician, and whether that evidence was properly incorporated into the questions posed to the vocational expert. The remand order was based only on petitioner's fourth contention—that the Commissioner had not carried his burden of showing that there were significant numbers of jobs in the national economy that petitioner was able to perform, because the jobs the ALJ identified required a physical attribute (the ability to reach constantly or frequently) that petitioner did not have. Pet. App. 25. The district court's decision therefore effectively limits petitioner's rights on remand. See Gov't Br. 24-25. In

that respect as well, petitioner was aggrieved by the district court's judgment and has a right of appeal to seek a judgment that orders a broader rehearing on remand.

b. Amicus also argues (Br. 15) that petitioner is not aggrieved by a sentence-four remand order "[u]nless or until" petitioner is denied disability benefits on remand. In that event, however, petitioner would be most immediately aggrieved not by the district court's judgment, but rather by the new decision of the Commissioner, which petitioner then would have to challenge in a new civil action in district court under Section 405(g). See *Finkelstein*, 496 U.S. at 625; *Schaefer*, 509 U.S. at 299. That new action could again result in another sentence-four remand for further agency proceedings, which could again result in another agency denial of benefits, and so on.

At bottom, amicus contends (Br. 15-19, 26-29) that a claimant can never be aggrieved by a final sentence-four judgment of remand as long as that judgment leaves open the opportunity for the claimant to obtain disability benefits on remand, and the claimant can ultimately challenge the district court's adverse rulings in some later appeal. In amicus's view (*id.* at 18), the general rule that a partially prevailing party may appeal aspects of the district court's decision denying the party's requested relief (see Gov't Br. 19-21) is inapplicable when the adverse decision expressly contemplates further proceedings. That contention, however, reads out of Section 405(g) its fourth sentence, which expressly gives the district court the power to enter a judgment in favor of petitioner "without remanding the cause for a rehearing." Cf. *Melkonyan* v. *Sullivan*, 501 U.S. 89, 92 (1991) (a decision that a claimant is entitled to

disability benefits grants the claimant "all the relief he had initially requested"). Because the district court entered a judgment of reversal *with* a remand for a rehearing, petitioner was not a fully prevailing party in the district court. *Jose*, 117 S. Ct. at 465.[4]

Moreover, by arguing that petitioner is not aggrieved because the decision is not sufficiently conclusive with respect to her ultimate claim for benefits, amicus conflates an issue of finality with the question of aggrievement and ignores Section 405(g), which "directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order." *Finkelstein*, 496 U.S. at 629. The fact that a party might obtain benefits at a later date *notwithstanding* the adverse decision does not mean that the party is not immediately aggrieved by

---

[4] Amicus does not question the principle announced in *Jose* that a party may "gain access to appeal from the District Court's final decision to the extent that it disfavor[s]" that party. 117 S. Ct. at 465. Instead, amicus argues (Br. 25-26 & n.21) that *Jose* is distinguishable because the adverse notice requirement in *Jose* appeared on the face of the district court's order; the district court judgment in *Jose* placed a restriction on the appellant; and the Court's decision turned on ripeness, not standing, grounds. The order of remand for further proceedings in this case, however, appears on the face of both the district court's opinion and judgment. J.A. 128-129. Moreover, the district court's remand order fails to award petitioner the disability benefits to which petitioner believes she is entitled. Finally, the fact that *Jose* discussed the doctrine of ripeness does not change the fact that petitioner, like the IRS in *Jose*, was "[a]ggrieved" by a "final * * * decision dispositively granting in part and denying in part the remedy requested." 117 S. Ct. at 465.

that decision when it is entered.[5] Indeed, the possibility that petitioner may obtain an award of benefits upon remand (or upon subsequent judicial review in a new civil action following remand) does not provide petitioner with the disability benefits she would now be receiving if the district court had reversed the Commissioner's decision outright. Thus, because the district court's judgment *finally* disposed of petitioner's contentions and did so in a manner that did not afford petitioner *all* the relief she requested, she is entitled to a "statutory right to appeal" under 28 U.S.C. 1291. *Roper*, 445 U.S. at 333.[6]

---

[5] For instance, when a court of appeals certifies an interlocutory issue for appeal under 28 U.S.C. 1292(b), the court reviews the district court's decision for errors notwithstanding the fact that the challenged decision may expressly contemplate further proceedings in which the appellant may ultimately prevail on the merits. See, *e.g.*, *Chan* v. *Korean Air Lines Ltd.*, 490 U.S. 122, 124-125 (1989) (reviewing court of appeals' decision under 28 U.S.C. 1292(b) that affirmed district court's denial of summary judgment); *Ricke* v. *Armco, Inc.*, 92 F.3d 720, 721, 726 (8th Cir. 1996) (affirming denial of summary judgment); see generally 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3931 (2d ed. 1996); see also 28 U.S.C. 1292(a)(1) (courts of appeals have jurisdiction over interlocutory decisions granting or refusing injunctions).

[6] Amicus misses the thrust of our submission when he argues (Br. 18 n. 14, 24-25) that this case is distinguishable from *Roper*, *supra*, and *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939), in which the Court permitted an appellant to seek to correct procedural errors in the district court's order. Our point is not that the issue on appeal in this case is directly analogous to that at issue in either of those decisions, but rather that this case squarely fits within the normal rule that a party may appeal a final decision of a district court that denies all of the relief the party requested.

Parr v. *United States*, 351 U.S. 513 (1956), heavily relied upon by amicus throughout his brief, is not to the contrary. In *Parr*, the government obtained, over the defendant's objection, the dismissal without prejudice of an indictment in one venue after it had brought an identical second indictment in a different venue. *Id.* at 514-515. This Court affirmed the court of appeals' decision to dismiss the defendant's appeal. The Court initially reasoned that if the first indictment is "viewed in isolation * * *, an appeal from its dismissal will not lie because petitioner has not been aggrieved." *Id.* at 516. The Court alternatively concluded that if the two indictments are "viewed together as parts of a single prosecution," then an appeal would not lie because the dismissal of the first indictment "would not be a final order." *Id.* at 518. The Court explained that "[t]o hold this order 'final' at this stage of the prosecution would defeat the long-standing statutory policy against piecemeal appeals." *Id.* at 519.[7]

Unlike the situation presented in *Parr*, sentence eight of Section 405(g) provides that a judgment that includes a remand *is* a final, appealable order,[8] and

---

[7] See also *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54 (1989) ("finality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence"); cf. *United States* v. *MacDonald*, 435 U.S. 850 (1978) (denial of defendant's motion to dismiss indictment based on Sixth Amendment speedy trial violation is not a final, appealable order).

[8] Amicus repeatedly relies (Br. 16-17, 23 n.19, 35) on the portion of the opinion in *Parr* in which the Court concluded that, although a defendant must "hazard a trial * * * before he can get a review of whether he should have been tried," the "the discomfiture and cost of a prosecution for crime" are

sentence four authorizes the district court to grant the relief (outright reversal) requested by petitioner and denied by the district court. The defendant-appellant in *Parr* had not requested any relief from the district court, and the court's dismissal of the indictment was not a ruling on the merits of the indictment. Indeed, the Court in *Parr* distinguished civil cases in which defendants had been permitted to appeal from judgments of a plaintiff's nonsuit on the ground that "the defendant was asserting a right to a judgment in his favor on the merits, claimed to have

obligations of citizenship. See 351 U.S. at 519-520. That passage relates to the Court's holding that the dismissal of the first indictment was not a final, appealable order. Amicus makes the same mistake in arguing that petitioner is not aggrieved by the litigation costs of proceeding before the Commissioner on remand when he relies on decisions reiterating the general rule that the burden of future proceedings does not render a decision immediately appealable in the absence of a final judgment. See *Jefferson* v. *City of Tarrant*, 118 S. Ct. 481, 485-486 (1997) (state court decision was not a final judgment under 28 U.S.C. 1257(a)); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of petition for certiorari) ("This present petition * * * seeks our intervention before the litigation below has come to final judgment."); *Baker* v. *General Motors Corp.*, 86 F.3d 811, 816-817 (8th Cir. 1996), rev'd on other grounds, 118 S. Ct. 657 (1998) (reviewing after final judgment interlocutory discovery sanction). That principle has no relevance here, where Congress conclusively has determined that a sentence-four judgment that includes a remand order is a final judgment and is therefore subject to a statutory right of immediate appeal under 28 U.S.C. 1291. See *Finkelstein*, 496 U.S. at 628 ("[R]espondent does not contest the power of Congress to define a class of orders as 'final judgments' that by inference would be appealable under § 1291. This is what Congress has done in the fourth sentence of § 405(g).") (citation omitted).

been fully established prior to the nonsuit, and was obviously aggrieved by the loss of that judgment." 351 U.S. at 517 n.9.

The Court in *Parr* thus carefully distinguished the type of case presented here, in which a civil litigant sought but was partially denied a favorable judgment on the merits. This Court's distinction of such cases is entirely consistent with the principle that a plaintiff who obtains less than the requested judgment on the merits is aggrieved and has a right of appeal. See *Roper*, 445 U.S. at 333; *Jose*, 117 S. Ct. at 465. Accordingly, *Parr* does not support the court of appeals' dismissal of petitioner's appeal for lack of jurisdiction. Cf. 15A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3902, at 81-82 (2d ed. 1992) (discussing limited application of *Parr* to criminal proceedings).

Amicus again erroneously imports finality principles into the determination of aggrievement when he contends (Br. 17-18 & n.13) that the district court's decision in this case is analogous to an *agency* decision remanding for further proceedings within the agency.[9] We agree that judicial review of intra-agency remands generally would be premature. See generally 5 U.S.C. 704 (providing for judicial review

[9] See *CH2M Hill Central, Inc* v. *Herman*, 131 F.3d 1244, 1246-1247 (7th Cir. 1997) (holding that Occupational Safety and Health Review Commission's decision to remand to ALJ was not the sort of final agency decision under 29 U.S.C. 659(c) that aggrieved appellant under 29 U.S.C. 660(a)); accord *Stripe-A-Zone* v. *Occupational Safety & Health Review Comm'rs*, 643 F.2d 230, 233 (5th Cir. 1981); see also *Director, OWCP* v. *Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1988) (decision by Benefits Review Board remanding matter to ALJ is not a final order of the Board under 33 U.S.C. 921(c)).

of "final agency action"). Accordingly, we would agree that petitioner could not have challenged in district court the July 1993 decision by the Appeals Council to remand petitioner's claim for benefits to the ALJ for a second hearing, J.A. 47, because the first sentence of Section 405(g) requires a "final decision of the Commissioner." Here, however, petitioner challenges a final district court decision that partially denied her the relief that she requested. She is aggrieved by the judgment to that extent and may appeal it.[10]

3. Petitioner Does Not Merely Challenge Statements In The District Court's Opinion That Are Unnecessary To Its Judgment

Amicus further contends that petitioner's appeal violates the principle that appellate courts "review[]

[10] Amicus suggests (Br. 19 n.15, 34) that the judgment below can be supported on the ground that petitioner's chances of prevailing on appeal are slim. We agree that petitioner is not likely to obtain an outright reversal on appeal, because the Commissioner's decision was supported by substantial evidence, and because even if the ALJ was wrong on one or more of the issues raised by petitioner, the proper disposition in such circumstances, as a general rule, is to remand the cause to the Commissioner for further proceedings, as the district court did here with respect to the one issue on which it ruled against the Commissioner. See Gov't Br. 25 n.15, 28-29. Petitioner's appeal is not frivolous (see Pet. C.A. Br. 21-31), however, and the likelihood of her success on appeal therefore has no bearing on whether the court of appeals has jurisdiction to hear the merits of petitioner's contentions. *Steel Co.* v. *Citizens for Better Environment*, 118 S. Ct. 1003, 1010 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.").

judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam). According to amicus (Br. i, 19-24), petitioner's appeal does not challenge the judgment of remand by the district court, but seeks additional rulings in support of that same judgment. That contention is unsound for several reasons.

As an initial matter, petitioner has challenged the judgment entered by the district court, which "remanded [the case] to the Secretary *for further proceedings*." J.A. 129 (emphasis added); see also J.A. 128 (ordering that "this case be remanded to the [Commissioner] for further proceedings in accordance with this opinion"). Petitioner by her appeal seeks a different and more favorable judgment—an outright reversal and award of immediate benefits "without * * * a rehearing." 42 U.S.C. 405(g).[11] Petitioner's appeal nowhere requests the court of appeals to adopt the three contentions of administrative error on which the district court ruled against her as alternative grounds for affirming the judgment of remand that the district court actually entered. Rather, petitioner challenges the three legal rulings

[11] In contrast, amicus relies on decisions in which the appellant did not seek to alter the terms of the lower court's judgment. See, *e.g.*, *Rooney*, 483 U.S. at 311 (certiorari improvidently granted when judgment "was *entirely* in the State's favor") (emphasis added); *In re DES Litig.*, 7 F.3d 20, 23-25 (2d Cir. 1993) (party who had received dismissal with prejudice did not seek modification of judgment); *Allstate Ins. Co.* v. *A.A. McNamara & Sons, Inc.*, 1 F.3d 133, 137 (2d Cir. 1993) (party filing cross-appeal did not seek to "alter the judgment in any way"); see also *Owen-Illinois, Inc.* v. *Aetna Cas. & Sur. Co.*, 990 F.2d 865 (6th Cir. 1993) (dismissing cross-appeal asserting alternative grounds for affirming judgment).

of the district court because, in her view, if those rulings are reversed, the court of appeals should order an outright reversal and award of benefits.

Amicus similarly is wrong in suggesting (Br. 3, 5, 23-24) that petitioner's court of appeals brief is procedurally defective in requesting a reversal of the Commissioner's decision and an immediate award of benefits by the Commissioner (Pet. C.A. Br. 18, 21, 27-28, 35), instead of modification of the district court's judgment. At the outset of her court of appeals brief, petitioner could not have requested alteration of the district court's judgment more clearly:

> This is an appeal, in a Social Security disability case, from the *Judgment* of Robert E. Jones, U.S. District Judge, District of Oregon, vacating the agency's final decision that Forney was not disabled, but remanding to the agency for further proceedings. Forney appeals, and requests a finding of disability and payment of benefits, *instead of remand for additional proceedings.*

Id. at 2 (emphases added); see also Pet. i ("May a Social Security Disability claimant who in district court procures a final judgment with an accompanying order of remand for additional administrative proceedings * * * appeal * * * on the ground that broader relief (*e.g.*, an outright award of disability benefits) should have been granted by the district court, based on issues which the district court decided adversely to the claimant?") (emphasis omitted).[12]

[12] There is nothing surprising or jurisdictionally significant about the fact that petitioner drafted her appellate brief to emphasize that she wanted the Commissioner to award her benefits without the further administrative proceedings ordered by the district court. Although courts of appeals review judgments of the district court, which in turn review the decisions of the Commissioner, see *O'Connor* v. *Shalala*, 23 F.3d 1232, 1234 (7th Cir. 1994), it is the Commissioner who ultimately must make payments of disability benefits if ordered to do so by a court.

4. The Policy Considerations Advanced By Amicus Do Not Warrant An Implied Exception To The Statutory Right Of Appeal

Finally, amicus argues (Br. 31-34) that permitting appeals by claimants in petitioner's position would overburden the courts of appeals. Amicus does not contest (*id.* at 30, 34), however, that most claimants will forgo a statutory right to appeal and instead seek benefits on remand because that is the most efficient and effective means of obtaining benefits. See Gov't Br. 26-28. Although amicus notes the number of district court actions seeking judicial review of final agency decisions,[13] amicus offers no reason why any appreciable number of claimants who obtain an order of remand will perceive an immediate appeal to be sufficiently in their interest to warrant pursuing that course in lieu of immediate administrative proceedings. Moreover, amicus does not challenge our submission that, should the Court hold that claimants may appeal a sentence-four judgment of remand,

[13] We have been informed by the Social Security Administration that, out of the 9,462 cases decided by district courts in Fiscal Year 1996, 38% resulted in a remand for further proceedings under either the fourth or the sixth sentence of Section 405(g), and six percent resulted in an outright reversal without further rehearing. Since Fiscal Year 1987, district courts have entered remands for rehearing in 37%-43% of all cases filed, and have ordered outright reversals in 6%-19% of those cases.

principles of issue preclusion should not be rigidly applied to force claimants to seek immediate appeal (instead of otherwise returning to the agency) in order to preserve their objections to the district court's opinion and judgment. See Gov't Br. 32-34. In those circumstances, the practical consequences of permitting claimant appeals should be quite limited.[14]

In any event, the possibility that appeals might increase does not furnish a basis for excepting petitioner's appeal from the general rule under 28 U.S.C. 1291 that a party aggrieved by a final judgment of a district court has a "statutory right to appeal." *Roper*, 445 U.S. at 333; cf. *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992) (noting "federal courts are vested with a virtually unflagging obligation to exercise the jurisdiction given them") (internal quotation marks omitted). The policy concerns expressed by amicus are more appropriately directed to Congress, which is in "a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955); see also *Finkelstein*, 496 U.S. at 628 (noting Congress's power to "define a class of orders as 'final judgments' that by inference would be appealable under § 1291").

Amicus further contends (Br. 35) that an appeal here would undermine the government's institutional

---

[14] In 1994, the Tenth Circuit permitted a claimant to appeal a sentence-four remand order. *Nguyen* v. *Shalala*, 43 F.3d 1400, 1402 n.2. Yet insofar as we are aware, no other claimant in that Circuit has attempted to follow suit. See also Gov't Br. 27 n.16 (discussing paucity of claimant appeals).

interest in allowing the Commissioner to correct administrative errors. Once the Commissioner has completed his administrative proceedings and finally denied a claimant's application for disability benefits, however, the first and fourth sentences of Section 405(g) afford the claimant a statutory right to seek judicial review in district court, and the eighth sentence provides that the district court's final decision "shall be subject to review in the same manner as a judgment in other civil actions." It is unlikely that any given claimant will appeal a district court judgment that reverses the Commissioner's decision and remands for a rehearing on the merits. But even in those situations in which an appeal might be taken, the Commissioner perceives no undue interference with his duties to administer the Social Security program as envisioned by Congress, because the claimant's appeal necessarily would be directed to those aspects of the district court's decision that were *favorable* to the Commissioner, and thereby had already respected his institutional interest in administering the program.

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded for consideration of petitioner's appeal on the merits.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1998

(8)

Supreme Court, U.S.
FILED
APR 13 1998
CLERK

No. 97-5737

In The

Supreme Court of the United States

October Term, 1997

SANDRA K. FORNEY,

Petitioner,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

RALPH WILBORN
(*Counsel of Record for Petitioner*)
RALPH WILBORN AND
ETTA L. WILBORN, P.C.
1580 Valley Drive, Suite 170
Eugene, Oregon 97401
(541) 485-4265

ETTA L. WILBORN
TIM WILBORN
RALPH WILBORN AND
ETTA L. WILBORN, P.C.
1580 Valley Drive, Suite 170
Eugene, Oregon 97401
(541) 485-4265

ERIC SCHNAUFER
2501 N. Lincoln Ave. #285
Chicago, Illinois 60614
(773) 935-4016
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

TABLE OF CONTENTS

Page

I. The Positions Of Petitioner, The Commissioner Of Social Security, And Amicus 1

II. Under Its Own Rationale, The District Court Should Have Entered Judgment Reversing The Commissioner's Final Decision, *Without* A Remand For A Rehearing, To Award Benefits 2

III. Petitioner Did Not Get "Everything She Asked For." 10

IV. The Availability Of Judicial Review Following An Unfavorable Decision After New Administrative Proceedings Upon Remand Will Not Provide Petitioner With An Adequate Forum To Challenge The District Court's Judgment And Order 12

V. Recognizing That Plaintiffs Such As Petitioner May Appeal Would Likely Decrease Appellate Workloads..... 17

VI. Conclusion..... 20

TABLE OF AUTHORITIES

Page

CASES

Allen v. Bowen, 881 F.2d 37 (3d Cir. 1989) 4, 6

Bowen v. Yuckert, 482 U.S. 137 (1997) 4

California v. Rooney, 483 U.S. 307 (1987) 8

Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) 12

Detrick v. Chater, 115 F.3d 573 (8th Cir. 1997) 9

Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) 4

Drummond v. Commissioner of Social Security, 126 F.3d 837 (6th Cir. 1997) 2

Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939) 8

Faucher v. Secretary of HHS, 17 F.3d 171 (6th Cir. 1994) 8, 9

Gibson-Jones v. Apfel, ___ F. Supp. ___, No. 95-C-874, 1998 WL 57080 (N.D. Ill. Jan. 23, 1998) 19

Johnson v. Heckler, 741 F.2d 948 (7th Cir. 1984) 6

Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48 (1952) 17

Key v. Sullivan, 925 F.2d 1056 (7th Cir. 1991) 2

Lester v. Chater, 81 F.3d 821 (9th Cir. 1995) 16

Lewis v. Callahan, 125 F.3d 1436 (11th Cir. 1997) 5

Light v. Social Security Admin., 119 F.3d 789 (9th Cir. 1997) 9

Parr v. United States, 351 U.S. 513 (1956) 16, 17

TABLE OF AUTHORITIES – Continued

Page

Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89 (1954) 12

Richardson v. Perales, 402 U.S. 389 (1971) 6

Shalala v. Schaefer, 509 U.S. 292 (1993) 16

Smith v. Shalala, 46 F.3d 45 (8th Cir. 1995) 9

Smolen v. Chater, 80 F.3d 1273 (9th Cir. 1996) 5

Stone v. Heckler, 761 F.2d 530 (9th Cir. 1985) 6

Sullivan v. Finkelstein, 496 U.S. 617 (1990) 2, 16, 17, 18

Terry v. Sullivan, 903 F.2d 1273 (9th Cir. 1990) 9

Titus v. Callahan, 133 F.3d 561 (8th Cir. 1997) 9

United States v. Jose, 117 S. Ct. 463 (1996) 2, 15, 16

STATUTES

28 U.S.C. § 1291 ..... 6, 13, 16

42 U.S.C. § 405(g) ..... *passim*

42 U.S.C. § 423(d) 6

REGULATIONS

20 C.F.R. § 404.1520(d) (1997) 3

20 C.F.R. § 404.1520(f) (1997) 3, 4

OTHER AUTHORITY

Social Security Ruling 96-8p, 61 Fed. Reg. 34,474 (1996) 5

I. The Positions Of Petitioner, The Commissioner Of Social Security, And Amicus.

The issue presented is whether a plaintiff seeking Social Security Disability benefits may appeal a district court judgment entered pursuant to sentence four of 42 U.S.C. § 405(g), reversing, *with* a remand for a rehearing, a final decision of the Commissioner of Social Security, in order to obtain a reversal of the Commissioner's final decision, *without* a remand for a rehearing (or a more favorable remand order). Petitioner and the Commissioner agree that Petitioner may appeal such a sentence-four judgment and that Petitioner is aggrieved by that judgment, but they disagree about matters related to the latter conclusion. (*See* Br. for Pet'r at 17-28; Br. for the Resp't at 31; *see also id.* at 16-23.) Amicus argues that Petitioner is not aggrieved by the judgment, and that the judgment is not appealable. (Br. of Amicus Curiae ("Br. of A.C.") at 12-19.)

Petitioner and Amicus disagree whether Petitioner is aggrieved by the legal effect the district court's disposition of Petitioner's Complaint will have on any new administrative proceedings upon remand. While Amicus does not dispute that the law of the case applies during any new administrative proceedings, or that the Commissioner is bound by any district court remand order, Amicus contends that the effect of the law of the case, or any district court remand order, does not make Petitioner an aggrieved party. (Br. of A.C. at 22-25.) With respect to issue preclusion, Petitioner and Amicus disagree about which of the district court's rulings are "necessary to the judgment." Amicus contends that issue preclusion applies only to a single issue, while Petitioner contends the district court's judgment precludes more issues.

The Commissioner appears to take the extraordinary position that (1) issue preclusion[1] does not apply *generally* to sentence-four judgments reversing with a remand for a rehearing, (Br. for Resp't at 30-34); (2) the law of the case[2] does not apply to administrative proceedings following a sentence-four judgment but may be invoked only in subsequent civil litigation, (*id.* at 33 & n.19); and (3) on remand, the Commissioner is "free to," but not required to, follow the district court's remand order, regardless of whether the court remand order includes rulings favorable or unfavorable to the non-government party, (*id.* at 24, 34).

The Court should conclude that the district court's final decision is appealable under the normal rules of civil litigation with special reference to the procedural posture of Petitioner's case and the plain language of sentence four of 42 U.S.C. § 405(g). *United States v. Jose*, 117 S. Ct. 463 (1996); *Sullivan v. Finkelstein*, 496 U.S. 617 (1990).

II. Under Its Own Rationale, The District Court Should Have Entered Judgment Reversing The Commissioner's Final Decision, *Without* A Remand For A Rehearing, To Award Benefits.

Sentence four of 42 U.S.C. § 405(g) provides that a court "shall have power to enter, upon the pleadings and

---

[1] The Commissioner's attack on issue preclusion based on court judgments is an extension of his attack on issue preclusion based on final agency actions. *See, e.g., Drummond v. Commissioner of Social Security*, 126 F.3d 837 (6th Cir. 1997).

[2] In civil litigation after a new final decision of the Commissioner, the Commissioner has resisted the reach of the law of the case. *See, e.g., Key v. Sullivan*, 925 F.2d 1056 (7th Cir. 1991). (*See also* Br. of A.C. at 22 n.18 (noting tension in Commissioner's litigation position).)

transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, *with or without* remanding the cause for a rehearing." 42 U.S.C. § 405(g) (emphasis added). Petitioner appealed a district court sentence-four judgment reversing a final decision, *with* a remand for a rehearing, on the basis that the district court was required to enter a sentence-four judgment *without* a remand for a rehearing.

Given the district court's own rationale, absent an articulated legitimate justification, the district court should have entered a sentence-four judgment *without* a remand for a rehearing. A Social Security disability claimant may be found "disabled" either at step three or at step five of the sequential analysis of disability. 20 C.F.R. § 404.1520(d) (1997) (step three); 20 C.F.R. § 404.1520(f) (1997) (step five). The Commissioner found Petitioner "not disabled" at step five. (J.A. at 27-28.) When it reviewed the Commissioner's decision finding Petitioner not disabled, the district court accepted that the Commissioner had the "burden of showing that [Petitioner] can engage in substantial gainful work in the economy[.]" (J.A. at 128.) Moreover, the district court held that the Commissioner "did not sustain her burden of proof in step five of the five-step evaluative process in determining whether [Petitioner] is entitled to benefits." (J.A. at 128.) The court reached this conclusion *accepting as true* the Commissioner's factual findings regarding Petitioner's residual functional capacity and vocational characteristics. (J.A. at 125-28.) Given the foregoing, Petitioner established her claim. Because the district court articulated no reason to give the Commissioner *another* opportunity to show that Petitioner could perform a significant number of jobs, the district court should have entered

judgment reversing the Commissioner's final decision without a remand for a rehearing. *See, e.g., Allen v. Bowen*, 881 F.2d 37 (3d Cir. 1989) ("The Secretary, in effect, asks this court for a second chance to prove his case because the testimony given by the first vocational expert did not satisfy the *Podedworny* teaching. We see no reason, however, why the Secretary should be afforded such an additional opportunity.").

As matters of law, public policy, and fairness, absent the court's articulated and legitimate justification, there should be no further administrative proceedings concerning the merits of a claim when a claimant for Social Security disability insurance benefits proves to a court that she has satisfied any burden of proof, including any burden of production or persuasion, she may have had and when the government did not satisfy any burden of proof, including any burden of production or persuasion, it may have had. Through 42 U.S.C. § 405(g), Congress has accorded claimants for Social Security disability insurance benefits this very protection – the right to court judgments reversing, *without* remands for rehearing, unfavorable agency decisions.[3]

[3] A "burden of proof" may be a burden of production and/or a burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272-74 (1994). The issue of the precise nature of the allocation of the burden of proof at step five of the sequential analysis, 20 C.F.R. § 404.1520(f) (1997), is not before this Court. Nonetheless we note that in *Bowen v. Yuckert*, 482 U.S. 137 (1997), this Court observed that the Commissioner "bears the burden of proof at step five," and that this "allocation of burdens of proof" was within the Commissioner's regulatory authority, *id.* at 146 n.5.

Petitioner appealed the district court's judgment for other reasons as well. At step five, a claimant is "disabled" if she cannot work on a full-time basis. *See* Social Security Ruling 96-8p, 61 Fed. Reg. 34,474, 34,476 (1996) (Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims). Due to this full-time work requirement, the district court should have found Petitioner disabled for two reasons. If the district court had accepted Petitioner's arguments regarding the weight due a treating physician's opinion and/or the evaluation of her credibility, the district court would have found that Petitioner could not work full time and that she was therefore disabled. (Pl.-Appellant's Br. at 18-23, 28.)[4]

The Amicus grounds its arguments in the erroneous assertion that Petitioner did not appeal the district court's judgment and that Petitioner's Ninth Circuit appeal was directed solely against the *Commissioner's* decision. (*See e.g.* Br. of A.C. at 3, 5, 21, 23-25.) Amicus overlooks that Petitioner's Notice of Appeal expressly appealed from the district court judgment. Amicus also fails to appreciate that Petitioner's appeal arose under appellate law governing *Social Security* appeals. When, pursuant to 42

[4] Contrary to appellate authority, Amicus asserts that the issues Petitioner raised (in addition to the failure of the vocational expert's testimony to carry the Commissioner's burden of proof) "are scarcely the type of challenges that, even when credited, lend themselves to outright reversal by a court lacking the authority to reweigh the evidence." (Br. of A.C. at 19 n.15.) *See, e.g., Lewis v. Callahan*, 125 F.3d 1436 (11th Cir. 1997) (awarding benefits based on review of Commissioner's evaluation of treating source opinions); *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996) (awarding benefits based on review of Commissioner's evaluation of claimant's testimony and treating source opinions).

U.S.C. § 405(g), a plaintiff initiates a civil action for judicial review of a final decision of the Commissioner finding that she was not under a "disability," 42 U.S.C. § 423(d), a district court determines both whether substantial evidence supports the Commissioner's final decision, including its essential subsidiary factual findings, and whether the Commissioner applied the proper legal standards when making his decision, 42 U.S.C. § 405(g) (sentence five).

Moreover, if a district court enters judgment under sentence four of section 405(g) *affirming* the Commissioner's decision, and the plaintiff appeals the district court's final decision, 28 U.S.C. § 1291, an appellate court applies the same substantial-evidence standard of review the district court applied. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420 (1971); *Johnson v. Heckler*, 741 F.2d 948, 953 (7th Cir. 1984) ("Our standard of review is the same as that of the district court pursuant to . . . 42 U.S.C. § 405(g)."). The standard of appellate review is thus *de novo*. Although an appellate court may reference a district court's rationale, *see, e.g., Allen*, 881 F.2d at 41, ultimately at issue is the *Commissioner's* final decision, not the district court's rationale for affirmance of that decision, *see, e.g., Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985). Given the foregoing, in the Ninth Circuit, Petitioner argued that *the Commissioner's decision* was not supported by substantial evidence and that it was based on the application of incorrect legal standards. When arguing that Petitioner did not attack the district court's judgment in the Ninth Circuit, Amicus thus overlooks both the applicable standard of appellate review and that, in the Ninth Circuit, Petitioner expressly appealed from the district court's judgment:

> This is an appeal, in a Social Security disability case, from the Judgment of Robert E. Jones, U.S. District Judge, District of Oregon, vacating the agency's final decision that Forney was not disabled, but remanding to the agency for further proceedings. Forney appeals, and requests a finding of disability and payment of benefits, instead of remand for additional proceedings.

(Pl.-Appellant's Br. at 2.) Because the appellate standard of review is *de novo*, on appeal of the district court's sentence-four judgment, Petitioner, of course, focused on errors in the Commissioner's final decision. The unwary appellant challenges the district court's rationale, neglecting the ultimate issue – whether the Commissioner's final decision should be reversed and, if so, in what manner.

Amicus asserts that Petitioner "seeks reversal of the *agency* decision, for reasons different than those stated in the district court opinion." (Br. of A.C. at 3 (emphasis original).) Amicus makes a similar assertion in his statement of the Question Presented:

> Whether a social security claimant who succeeds in winning a district court judgment pursuant to 42 U.S.C. § 405(g), setting aside an agency decision to deny benefits and remanding to give the claimant an opportunity to secure all the benefits she seeks, is entitled to bring an appeal seeking reversal of the agency's decision *for additional reasons not relied upon by the district court in entering judgment in the claimant's favor.*

(Br. of A.C. at i (emphasis added).) Amicus thus overlooks that Petitioner appealed the district court's judgment because, *given its own reasoning and findings*, the district court should have entered judgment reversing the Commissioner's final decision, without a remand for a rehearing. At the appellate court, Petitioner argued that,

given its own rationale, the district court should have entered judgment reversing the Commissioner's decision, *without* a remand for a rehearing. Petitioner is thus aggrieved by the district court's final judgment.[5]

Amicus also erroneously argues that "a remand is plainly necessary so that additional evidence may be taken on whether employment opportunities exist for someone *with* [Petitioner's] ability." (Br. of A.C. at 19 n.15 (emphasis original).) With this proposition, Amicus ignores the significance of its citation to *Faucher v. Secretary of HHS*, 17 F.3d 171 (6th Cir. 1994).

Petitioner has endured *two* administrative hearings and, *according to the district court*, the record *already* includes the Commissioner's proffer of step-five vocational evidence for someone with Petitioner's residual functional capacity and vocational characteristics. (J.A. at 47, 125-28.) This is consistent with the record. In response to a question from an administrative law judge (ALJ), a vocational expert identified two occupations which Petitioner purportedly could perform. In response to a question whether there were *any other jobs* the vocational expert could rely on, the vocational expert answered "No." (Transcript at 88; Pl.-Appellant's Reply Br. at 14.)

The district court held that the ALJ's finding Petitioner could perform the jobs identified by the vocational expert – *assuming the validity of the ALJ's own findings regarding Petitioner's residual functional capacity* – was not

---

[5] In light of Petitioner's challenge of the district court's judgment on its own terms, Amicus' heavy reliance on *California v. Rooney*, 483 U.S. 307 (1987), and its attempt to distinguish *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), are inapposite. (Br. of Amicus Curiae at 20-22 (*Rooney*); *id.* at 24-25 (*Electrical Fittings*).)

supported by substantial evidence. At that point, the district court should have reversed the ALJ's decision and directed that Petitioner be found disabled because, assuming the residual functional capacity as ultimately found by the ALJ, the vocational expert could *not* identify *any other jobs* Petitioner could perform. Thus, with the two inappropriate jobs eliminated (by the district court's holding) and *no other jobs* identifiable, it is established that Petitioner *cannot perform any jobs*, and she is, therefore, disabled. Under these circumstances, "all essential factual issues have been resolved and the record adequately establishes a plaintiff's entitlement to benefits." *Faucher*, 17 F.3d at 176.

Under such circumstances, where the Commissioner fails to satisfy his burden at step five, a court has authority to hold – and in some cases is required to hold – that the Commissioner's final decision should be reversed without a remand for a rehearing, i.e., the court should hold that the claimant is under a disability. *See, e.g., Terry v. Sullivan*, 903 F.2d 1273, 1278-80 (9th Cir. 1990) (holding the Commissioner did not satisfy his step-five burden and further fact-finding was unwarranted); *Detrick v. Chater*, 115 F.3d 573, 575 (8th Cir. 1997) (similar); *Smith v. Shalala*, 46 F.3d 45, 47 (8th Cir. 1995) (similar).

Petitioner acknowledges that the Commissioner's failure to satisfy his burden of proof at step five, however construed, does not *always* warrant reversal of the Commissioner's final decision, without a remand for a rehearing. The Commissioner's failure sometimes warrants reversal with a remand for a rehearing, *see, e.g., Light v. Social Security Admin.*, 119 F.3d 789, 793-94 (9th Cir. 1997); *Titus v. Callahan*, 133 F.3d 561, 564-65 (8th Cir. 1997). However, this Court should not find that the district

court's judgment below was not *appealable*, based on the Amicus' erroneous assertion that Petitioner would not be able to prevail on the merits before the Ninth Circuit (*i.e.*, to procure a Ninth Circuit decision holding that reversal of the Commissioner's final decision without a remand for a rehearing was warranted).

III. Petitioner Did Not Get "Everything She Asked For."

The Amicus erroneously states that "as a matter of pleading, [Petitioner] got *everything* she asked for when the District Court set aside the agency decision and remanded." (Br. of A.C. 14 (emphasis added).) Petitioner sought first and foremost reversal of the Commissioner's final decision without a remand for a rehearing, i.e., reversal and a remand for a (ministerial) finding that she was under a disability (and thus entitled to benefits). (J.A. at 37, 92-93.) Only as a lesser relief did Petitioner seek a judgment reversing with a remand "for *proper* evaluation of the evidence or a hearing *de novo*." (J.A. at 37.) Petitioner received only part[6] of the latter relief.[7]

---

[6] Petitioner received a remand, but not for *proper* evaluation of the evidence and not for a *de novo* rehearing. Instead, the district court expressly ordered the agency to apply *improper* standards to the evaluation of the evidence during remand proceedings and to narrowly restrict those proceedings: "IT IS ORDERED that this case be REMANDED to the Secretary for further proceedings *in accordance with this opinion*." (J.A. at 128 (emphasis added).)

[7] Amicus claims that after the district court entered judgment Petitioner only "belatedly and self-servingly" argued that she sought as her primary relief reversal of the Commissioner's final decision without a remand for a rehearing as opposed to reversal with a remand for a rehearing. (Br. of A.C. at 15 n.12.) This claim is unreasonable given that in her Complaint Petitioner plainly stated that she first sought a reversal of the Commissioner's final decision without a remand for a rehearing and only if that relief were not granted a reversal with a remand for a "*de novo*" rehearing. (J.A. at 37.) Further, in the district court, Petitioner concluded her brief with a request for relief that mentioned *only* reversal *without* a remand for a rehearing, i.e., for a finding of disability. (J.A. at 92-93 ("and Plaintiff should be found disabled").)

A sentence-four judgment reversing a final decision of the Commissioner, *with* a remand for a rehearing, is *necessarily* a denial of the request for a judgment reversing *without* a remand for a rehearing. When the district court remanded this matter for a rehearing, it implicitly *denied* Petitioner's request for a judgment reversing the Commissioner's final decision *without* a remand for a rehearing. Thus, Amicus is simply wrong to assert that Petitioner "got everything she asked for," (Br. of A.C. at 14), particularly when Amicus accepts that, all else being equal, Petitioner has only a sixty percent chance of being found disabled after her claim is reheard by the agency, (*id.* at 13).

Amicus further argues that because Petitioner "emphatically does not challenge the *judgment* in her favor," Petitioner "runs afoul of the rule that courts review judgments, not statements in opinions." (Br. of A.C. at 8 (emphasis original).) Petitioner discussed above how this is not true. Properly understood, Petitioner's challenge to the rulings underlying the district court's denial of this requested relief is a challenge to the judgment. Hence, contrary to Amicus' arguments, issues Petitioner raised in the Ninth Circuit (besides the significance

of the Commissioner's failure to satisfy his step-five burden of proof), are subject to issue preclusion in subsequent administrative and judicial proceedings insofar as the district court's rulings on those issues *were necessary* to the district court's denial of Petitioner's request for a judgment reversing without a remand for a rehearing. Thus aggrieved, Petitioner has standing to appeal the district court's final decision for reasons other than the district court's failure to appreciate the significance of the Commissioner's failure to satisfy his burden of proof. *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99-101 (1954).

IV. The Availability Of Judicial Review Following An Unfavorable Decision After New Administrative Proceedings Upon Remand Will Not Provide Petitioner With An Adequate Forum To Challenge The District Court's Judgment And Order.

In support of his position that the district court's judgment is not appealable, Amicus argues that Petitioner may obtain judicial review of any of the district court's rulings if she is not found disabled after the remand proceedings. (Br. of A.C. at 14, 23, 26-29.) Amicus does not acknowledge the significance of the standard of judicial review of a new final decision of the Commissioner. If Petitioner receives an unfavorable final decision after her claim is reheard by the agency, and if Petitioner files a new complaint, the district court will determine whether *substantial evidence* supports the Commissioner's *new* final decision. 42 U.S.C. § 405(g) (sentence five). Because substantial evidence is *less than* a preponderance of the evidence, *Consolidated Edison Co. v. NLRB*, 305 U.S.

197, 229 (1938), a district court may (in some circumstances) *properly* enter a sentence-four judgment affirming the Commissioner's *new* final decision even if on remand Petitioner established to the Commissioner by a preponderance of the evidence that she was disabled. Given the substantial-evidence standard of review, this Court should find that Petitioner's right to file a new complaint following receipt of an unfavorable decision after her claim is reheard does not provide Petitioner with an adequate forum to challenge the district court's prior rulings.

The importance of the substantial-evidence standard of review is stark when one assumes, as the Court should to resolve *the issue of appealability* of the district court's final decision pursuant to 28 U.S.C. § 1291, that Petitioner correctly maintains that the district court should have entered a sentence-four judgment reversing the Commissioner's final decision, without a remand for a rehearing. Amicus would permit Petitioner to be denied benefits even though the record showed *three* times that she was disabled at step five, as follows: *First*, the Commissioner should have found Petitioner disabled at the hearing level. *Second*, the district court should have found Petitioner disabled and accordingly entered a sentence-four judgment reversing, without a remand for a rehearing, the Commissioner's final decision. *Third*, after the hypothesized proceedings upon remand, the Commissioner should have found Petitioner disabled, but a court would not reverse the Commissioner's new decision because although it was not based on a preponderance of the evidence, it was supported by substantial evidence. This Court should not endorse Amicus' position leading to this anomalous, inequitable result, particularly since

the express language of section 405(g) empowers a court to enter a judgment reversing the Commissioner's decision *without* a remand for a rehearing.

Furthermore, a Social Security plaintiff will *not* be able to obtain review of many of the unfavorable rulings in a district court's decision related to a sentence-four judgment reversing with a remand for a rehearing a final decision of the Commissioner. In most cases in which there is a rehearing following a district court reversal, additional evidence will be submitted by the claimant, by the Commissioner, or both. Judicial review of a Commissioner's unfavorable final decision following the rehearing will thus commonly involve review of significantly different factual findings on a significantly different factual record. For some matters, an expanded record will permit the Commissioner a second, third, or even fourth opportunity to satisfy his burden of proof at step five – subject only to deferential substantial evidence review – even though the pre-remand evidentiary record warranted a finding of disability.

Moreover, during remand proceedings the Commissioner may generally create new medical evidence – e.g., opinion evidence from a non-examining medical source or a report from an examining medical source – that may be substantial evidence permitting judicial affirmance of the Commissioner's *incorrect* final decision following remand proceedings.

Petitioner disagrees with the Commissioner and Amicus that a forty-percent chance of being found "not disabled" after a plaintiff's claim is reheard, (Br. of A.C. at 30 n.25; Br. of Resp't at 27), provides adequate protection of Petitioner's interests. This is especially true when, as in Petitioner's case, the pre-remand evidentiary record

interpreted in light of the applicable legal standard mandates a finding of disability: Petitioner appealed the district court's judgment because the Commissioner should not be permitted a third bite at the apple.

Viewed differently, Amicus neglects or denigrates the aspect of the district court's decision ordering the Commissioner to conduct remand proceedings consistent with its opinion. (J.A. at 128 ("IT IS ORDERED that this case be REMANDED to the Secretary for further proceedings *in accordance with this opinion.*" (italicized emphasis added).)[8] Because the Commissioner was *ordered* to conform its remand proceedings to the district court's Opinion and Order (J.A. at 118-28), Amicus' attempt to distinguish *Jose*, 117 S. Ct. 473, fails. Amicus argues that,

---

[8] In order to diminish the legal significance of the district court's remand order, Amicus posits, "As is customary, the District Court did not specify the precise proceedings that must take place on remand." (Br. of Amicus Curiae at 5 n.3.) It is unclear how Amicus knows what customarily accompanies sentence-four judgments reversing, with remands for rehearings, final decisions of the Commissioner. In any case, it is clear that the Commissioner, during remand proceedings, could not, at least for the time period previously adjudicated, find Petitioner "not disabled" at step four of the sequential analysis of disability. Nor could the Commissioner find Petitioner "not disabled" at step five, without supporting vocational expert testimony. Moreover, although pursuant to the district court's order, the Commissioner should not revisit the precise issues Petitioner lost in the district court, if the Commissioner did revisit those issues in a manner advantageous to Petitioner, neither the Petitioner nor the Commissioner would have standing to argue in later judicial proceedings that the Commissioner did not comply with those rulings as incorporated in the district court's remand order.

unlike the order at issue in *Jose*, the district court's decision herein "imposes absolutely no restrictions (injunctive or otherwise) on [Petitioner] [.]" (Br. of A.C. at 26.)

To the contrary, the district court *ordered* the Commissioner on remand to follow the district court's analyses regarding the evaluation of an opinion from Petitioner's treating source and regarding Petitioner's own credibility. If the Commissioner complies with the court's mandate, Petitioner will have a much more difficult time establishing disability. Indeed, treating source opinions and claimants' credibility often are *dispositive* of a claim for disability insurance benefits. *See, e.g., Lester v. Chater*, 81 F.3d 821, 830-34 (9th Cir. 1995).

Nor is *Parr v. United States*, 351 U.S. 513 (1956), persuasive authority that the availability of judicial review following an unfavorable final decision means that Petitioner is not aggrieved. (Br. of A.C. at 16-19.) This Court held that Parr could not appeal an order of dismissal of an indictment because until Parr was retried he was not aggrieved by the indictment's dismissal. *Parr*, 351 U.S. at 518-21. Importantly, *Parr* is based on the principle that only final district court dispositions are appealable. *Id.* at 517-20. Here *Finkelstein* teaches that the district court's disposition of Plaintiff's Complaint is *final* for the purpose of 28 U.S.C. § 1291. *Finkelstein*, 496 U.S. at 624-25, 629; *see also Shalala v. Schaefer*, 509 U.S. 292, 299 (1993) (following *Finkelstein*). The *Parr* Court, in contrast, expressly characterized the indictment's dismissal as "interlocutory," *Parr*, 351 U.S. at 518. In the instant case, the district court's sentence-four judgment was *not* interlocutory. *Finkelstein*, 496 U.S. at 629.[9] Moreover, if an

[9] Amicus' reliance on the general rule that a court remand to an agency for further proceedings is not appealable as

analogy is to be drawn to the criminal context, it is significant that Parr had not been tried and jeopardy had not attached. *Parr*, 351 U.S. at 518. Petitioner, on the other hand, has been "tried" – she has undergone *two* administrative hearings and a district court review. Having established that she is "disabled," she opposes a rehearing on double jeopardy grounds.

V. Recognizing That Plaintiffs Such As Petitioner May Appeal Would Likely Decrease Appellate Workloads.

Amicus speculates that recognizing the right to appeal of plaintiffs such as Petitioner could lead to a "substantial" increase in the number of appellate cases. (Br. of A.C. at 33.) Such speculation ignores a central function of the appellate courts – providing guidance to district courts regarding proper legal standards.[10] If, for example, Petitioner were to convince the Ninth Circuit that the district court should have entered a judgment reversing *without* a remand for a rehearing, and if the Ninth Circuit were to publish its decision, district courts within the circuit might be less likely to *fail* to enter, when appropriate, sentence-four judgments reversing

interlocutory, (Br. of A.C. at 10 n.7), is misguided in light of the plain language of § 405(g). As explained in *Finkelstein*, a judgment entered pursuant to sentence four of § 405(g) is *final* (i.e., *not* interlocutory), even though that judgment is accompanied by an order of remand.

[10] *Cf. Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 55 (1952) (Frankfurter, J., dissenting) ("Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation.")

without remands for rehearings. Application by the district courts of such appellate guidance would substantially reduce the need for appellate litigation, and it would simultaneously obviate many unnecessary new administrative proceedings. Of itself, the value of such guidance is reason to permit Petitioner to appeal.

Amicus' speculation that there would be a "substantial" increase in the number of appeals to federal appellate courts if this Court found that plaintiffs such as Petitioner could appeal is unfounded. *Finkelstein* was published in 1990, and it fairly announced sentence-four judgments to be appealable. Under the deferential "substantial evidence" standard of review, however, appellate courts affirm the vast majority of appeals of final decisions of the Commissioner finding claimants "not disabled." Moreover, since the publication of *Finkelstein*, apart from Petitioner's, there are only two published cases, and a handful of unpublished cases, where such plaintiffs have appealed sentence-four judgments remanding for a rehearing.[11] Given this background, it is unlikely that this Court's clarifying Petitioner's right to appeal will suddenly inspire similarly situated plaintiffs to appeal.

To achieve outright reversals, appellants must show not only that substantial evidence does not support the Commissioner's final decision but that the existing record necessarily establishes entitlement to benefits under applicable legal standards. This daunting challenge likely explains why *Finkelstein* itself did not open the floodgates.

---

[11] *See* Br. for Resp't. at 22 n.13; Br. for Pet. at 29-30.

Amicus also fails to acknowledge that appellate litigation is extremely time consuming for claimants' attorneys. It is not highly remunerative – Social Security claimants win relatively few appeals. The appellate courts will not be flooded with appeals from attorneys sinking (very) roughly one hundred hours into an appeal subject to a deferential standard of review.[12]

In any case, because a plaintiff such as Petitioner has a statutory right to a judgment reversing without a remand for a rehearing, 42 U.S.C. § 405(g), even if permitting such appeals were to result in increased appellate litigation, given the plain language of the statute, it is likely that Congress intended the balance to favor appeals to ensure that claimants timely receive the benefits to which they are lawfully entitled.

Amicus and the government also overlook the value of a central function of appellate court decisions – broadcasting the correct legal standards to district courts within the circuit. For future purposes, if the appellate court were to hold that the district court erroneously failed to enter judgment reversing, without a remand for a rehearing, i.e., that the district court should have found Petitioner disabled, then the appellate court's decision would inform that district court specifically, and district courts within the circuit generally, that they should correctly assess whether claimants are entitled to outright awards of benefits, thereby negating any further judicial or administrative delay over such claims. The text of

---

[12] *See, e.g., Gibson-Jones v. Apfel*, ___ F. Supp. ___, No. 95-C-874, 1998 WL 57080, at *2-3 (N.D. Ill. Jan. 23, 1998) (referring to 96.5 hours of attorney time expended appealing a district court's affirmance of the Commissioner's decision finding a claimant not disabled).

section 405(g), and practical and jurisprudential factors, thus weigh in favor of holding the district court's judgment was appealable.

VI. Conclusion

The Court should recognize that the effect of the plain language of section 405(g) is to permit Petitioner to appeal and that this result is consistent with Congressional intent. The Court should reverse the Ninth Circuit's dismissal of Petitioner's appeal and order the Ninth Circuit to consider the merits of the appeal.

Respectfully submitted,

RALPH WILBORN
(*Counsel of Record for Petitioner*)

ETTA L. WILBORN
TIM WILBORN
RALPH WILBORN AND
ETTA L. WILBORN, P.C.
1580 Valley Drive, Suite 170
Eugene, Oregon 97401
(541) 485-4265

ERIC SCHNAUFER
2501 N. Lincoln Ave. #285
Chicago, Illinois 60614
(773) 935-4016

(9)

No. 97-5737

Supreme Court, U.S.
FILED
MAR 27 1998
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SANDRA K. FORNEY,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

ALLEN R. SNYDER
(Amicus Curiae, invited by Court, per Order of January 26, 1998)
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

45 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a social security claimant who succeeds in winning a district court judgment pursuant to 42 U.S.C. § 405(g), setting aside an agency decision to deny benefits and remanding to give the claimant an opportunity to secure all of the benefits she seeks, is entitled to bring an appeal seeking reversal of the agency decision for additional reasons not relied upon by the district court in entering judgment in the claimant's favor.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. SECTION 405(g) JUDGMENTS ARE "SUBJECT TO REVIEW IN THE SAME MANNER AS * * * JUDGMENT[S] IN OTHER CIVIL ACTIONS"	9
II. IN OTHER CIVIL ACTIONS, THE JUDGMENT ENTERED BELOW WOULD NOT BE APPEALABLE BY A PARTY IN FORNEY'S POSITION	12
A. Forney Is Not Aggrieved By The District Court Judgment, And Thus Lacks Standing To Appeal It	12
B. Forney Does Not Challenge The District Court Judgment, But Rather Statements Unnecessary To That Judgment	19
C. The Challenged Statements Are Reviewable In Later Proceedings If Forney Does Not Prevail On Remand	26
III. PRACTICAL AND INSTITUTIONAL CONSIDERATIONS COUNSEL IN FAVOR OF HOLDING THAT A PARTY IN FORNEY'S POSITION MAY NOT APPEAL	29
CONCLUSION	36

TABLE OF AUTHORITIES

Cases: Page

Affiliated Ute Citizens of Utah v. *Ute Indian Tribe of Uintah & Ouray Reservation*, 22 F.3d 254 (10th Cir. 1994) 14

Allstate Ins. Co. v. *A.A. McNamara & Sons, Inc.*, 1 F.3d 133 (2d Cir. 1993) 20

Arizonans for Official English v. *Arizona*, 117 S. Ct. 1055 (1997) 14

Baker v. *General Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), *rev'd on other grounds*, 118 S. Ct. 657 (1998) 23

Balcom v. *Lynn Ladder & Scaffolding Co.*, 806 F.2d 1127 (1st Cir. 1986) (per curiam) 27, 28

Bath Iron Works Corp. v. *Coulombe*, 888 F.2d 179 (1st Cir. 1989) (per curiam) 12

Board of Trustees v. *Sweeney*, 439 U.S. 24 (1978) (per curiam) 32

Bohms v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), *cert. denied*, 390 U.S. 964 (1968) 11

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 27

California v. *Rooney*, 483 U.S. 307 (1987) (per curiam) ..... *passim*

CH2M Hill Central, Inc. v. *Herman*, 131 F.3d 1244 (7th Cir. 1997) 17, 23

Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 19-20

Colvin v. *Sullivan*, 939 F.2d 153 (4th Cir. 1991) 11

Concerned Citizens of Cohocton Valley, Inc. v. *New York State Dep't of Envt'l Conservation*, 127 F.3d 201 (2d Cir. 1997) 12, 20, 24-25

Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 10

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 11

Deposit Guaranty Nat'l Bank v. *Roper*, 445 U.S. 326 (1980) ..... *passim*

Director, Office of Workers' Compensation Programs v. *Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1988) 11, 17

TABLE OF AUTHORITIES—Continued

Page

Donlon Indus., Inc. v. *Forte*, 402 F.2d 935 (2d Cir. 1968) 34

Electrical Fittings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241 (1939) 24, 25

Farr v. *Gruber*, 950 F.2d 399 (7th Cir. 1991) 12

Faucher v. *Secretary of Health & Human Servs.*, 17 F.3d 171 (6th Cir. 1994) 19

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981) 11

Fletcher v. *Atex, Inc.*, 68 F.3d 1451 (2d Cir. 1995) 21

FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) 19

FTC v. *Standard Oil Co. of Cal.*, 449 U.S. 232 (1980) 35

Gelb v. *Royal Globe Ins. Co.*, 798 F.2d 38 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987) 28

Goatcher v. *Chater*, 57 F.3d 980 (10th Cir. 1995) 10

Gunn v. *University Comm. to End the War in Viet Nam*, 399 U.S. 383 (1970) 12

Hays v. *Sullivan*, 907 F.2d 1453 (4th Cir. 1990) 19

Hutto v. *Davis*, 454 U.S. 370 (1982) (per curiam) 20

In re DES Litig., 7 F.3d 20 (2d Cir. 1993) 12, 23, 25, 27

In re Sims, 994 F.2d 210 (5th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994) 12

In re Yarn Processing Patent Validity Litig., 530 F.2d 83 (5th Cir. 1976) 15

Jefferson v. *City of Tarrant*, 118 S. Ct. 481 (1997) 23

Manufacturers Credit Corp. v. *SEC*, 395 F.2d 833 (3d Cir. 1968) 15

McCarthy v. *Madigan*, 503 U.S. 140 (1992) 35

Monongahela Valley Hosp., Inc. v. *Sullivan*, 945 F.2d 576 (3d Cir. 1991) 11

Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 27

Nelson v. *Apfel*, 131 F.3d 1228 (7th Cir. 1997) 19

O'Connor v. *Shalala*, 23 F.3d 1232 (7th Cir. 1994) 10, 24

Occidental Petroleum Corp. v. *SEC*, 873 F.2d 325 (D.C. Cir. 1989) 11

Owens-Illinois, Inc. v. *Aetna Cas. & Sur. Co.*, 990 F.2d 865 (6th Cir. 1993) 20

TABLE OF AUTHORITIES—Continued

Page

Parr v. *United States*, 351 U.S. 513 (1956) ..... *passim*
Partmar Corp. v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89 (1954) 28, 31
Penda Corp. v. *United States*, 44 F.3d 967 (Fed. Cir. 1994), *cert. denied*, 514 U.S. 1110 (1995) 20
Perez v. *Ledesma*, 401 U.S. 82 (1971) 12
Public Serv. Comm'n v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939) (per curiam) 12
Shalala v. *Schaefer*, 509 U.S. 292 (1993) 13, 26
Showtime Networks Inc. v. *FCC*, 932 F.2d 1 (D.C. Cir. 1991) 12
Southern Natural Gas Co. v. *FERC*, 877 F.2d 1066 (D.C. Cir. 1989) 15
Star Fin. Servs., Inc. v. *AASTAR Mortgage Corp.*, 89 F.3d 5 (1st Cir. 1996) 15
Steel Co. v. *Citizens for a Better Env't*, 66 U.S.L.W. 4174 (U.S. Mar. 4, 1998) 14
Stripe-A-Zone v. *Occupational Safety & Health Review Comm'rs*, 643 F.2d 230 (5th Cir. 1981) (per curiam) 17-18
Sullivan v. *Finklestein*, 496 U.S. 617 (1990) ..... *passim*
Travelstead v. *Derwinski*, 978 F.2d 1244 (Fed. Cir. 1992) 11
Travis v. *Sullivan*, 985 F.2d 919 (7th Cir. 1993) 11
United States Office of Personnel Management v. *FLRA*, 905 F.2d 430 (D.C. Cir. 1990) 17
United States v. *Jose*, 117 S. Ct. 463 (1996) (per curiam) 25, 26
United States v. *Ligori*, 658 F.2d 130 (3d Cir. 1981) (per curiam) 15
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 23

Constitution:

U.S. Const. art. III 14

Statutes:

Social Security Act, 42 U.S.C. § 401 *et seq.* 3
42 U.S.C. § 405(g) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476 2
28 U.S.C. § 1291 12
29 U.S.C. § 660(a) 17

Rule:

Fed. R. Civ. P. 8(a) 14, 15

Legislative Materials:

H.R. Rep. No. 76-728 (1939) 10
S. Rep. No. 76-734 (1939) 10

Other Authorities:

Diana G. Culp, *Fixing the Federal Courts*, 76 A.B.A. J. 63 (June 1990) 32
Division of Appeal Assessment of the Office of Policy & Procedures, Social Security Administration Office of Hearings & Appeals, *Court Remands: Analysis & Recommendations* (Dec. 1987) 32
Jerry L. Mashaw *et al.*, *Social Security Hearings and Appeals* (1978) 32
James W. Moore, *Moore's Federal Practice and Procedure* (3d ed. 1997) 21-22, 28
Restatement (Second) of Judgments (1982) 28
Hon. William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary* (Jan. 1, 1998) 31
Social Security Administration, *Annual Statistical Supplement, 1997* (Dec. 1997) 32
Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (1st ed. 1981 & 2d ed. 1992) 12, 21, 28, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-5737

SANDRA K. FORNEY,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

INTEREST OF AMICUS CURIAE

On January 26, 1998, this Court invited Allen R. Snyder to brief and argue this case, as amicus curiae, in support of the judgment below. 118 S. Ct. 902. This brief is submitted in accordance with the Court's order.

INTRODUCTION

The Social Security Act vests primary responsibility for distributing benefits in the executive agency charged with administering the program (the Social Security Administration, or SSA), but gives claimants the right to challenge adverse, final agency decisions in federal court.

See 42 U.S.C. § 405(g).[1] A district court entertaining such a challenge has the "power to enter * * * a judgment affirming, modifying, or reversing the decision of the Commissioner of [SSA], with or without remanding the cause for a rehearing." *Id.* "The judgment of the court [is] final except that it [is] subject to review in the same manner as a judgment in other civil actions." *Id.* The question presented is whether a claimant who wins a favorable district court judgment pursuant to Section 405(g), setting aside the Commissioner's decision to deny benefits and remanding to give the claimant another opportunity to secure the claimed benefits, is entitled to appeal on the ground that the Commissioner's decision is erroneous for additional or alternative reasons.

In *Sullivan* v. *Finklestein*, 496 U.S. 617, 624-625 (1990), this Court held that the Secretary of Health and Human Services[2] was entitled to appeal a district court judgment entered pursuant to Section 405(g), where the judgment set aside the agency decision to deny benefits and remanded for further consideration of that issue. Recognizing that "[t]here is, of course, a great variety in remands, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges," the Court expressly limited its holding to the particular circumstances in *Finklestein*. *Id.* at 623 & n.3. Of particular importance was the fact that, if the Secretary were not permitted to bring an immediate appeal, the agency likely would be denied any opportunity to challenge the district court judgment—which "essentially invalidated * * * [agency] regu-

[1] Section 405(g) is reproduced in the addendum hereto.

[2] In 1994 Congress transferred the administration of the social security program from the Secretary of Health and Human Services to the Commissioner of SSA. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476.

lations," *id.* at 624—in the event the claimant prevailed on remand. *Id.* at 625.

This case is a variant of *Finklestein*, but with the relevant procedural circumstances turned essentially inside out. The appellant in this case is the disability claimant, not the agency, and, quite unlike the Secretary in *Finklestein*, the appellant here *won* in the District Court. As she prayed for in her complaint, the District Court set aside the agency decision to deny the claimed benefits and remanded to give her an opportunity to secure those benefits. In addition, unlike the Secretary in *Finklestein*, the appellant here would not be prevented from obtaining review of any aspect of the district court decision below following the remand, in the event she does not obtain the claimed benefits on remand. And, unlike the Secretary in *Finklestein*, the appellant here does not seek reversal or even vacatur of the district court judgment, but instead seeks reversal of the *agency* decision, for reasons different than those stated in the district court opinion.

The Court of Appeals below concluded that—in these starkly different circumstances from *Finklestein*—the appeal by the claimant in this case should be dismissed. As we explain, that ruling comports with Section 405(g), as well as with settled principles governing the review of judgments in other civil actions, and accordingly should be affirmed.

STATEMENT OF THE CASE

Petitioner Sandra K. Forney ("Forney") applied to SSA in November 1991 for disability insurance benefits pursuant to Title II of the Social Security Act, as amended, 42 U.S.C. § 401 *et seq.* Forney claimed that she had been disabled since June 7, 1991, due to fibrositis, a condition which allegedly prevented her from holding or obtaining substantial gainful employment. J.A. 11. Following a hearing, an Administrative Law Judge ("ALJ") found—

based on physician testimony that Forney's condition did not preclude all work, and the ALJ's own doubts as to the credibility of Forney's pain testimony—that Forney was not disabled, and denied her benefits claim. Forney appealed to the SSA Appeals Council, which remanded to the ALJ for further proceedings, including another medical examination. Following a second hearing, the ALJ denied Forney's disability claim, and this time the Appeals Council denied review. Pet. App. 4, 16.

In September 1994, Forney filed a complaint pursuant to 42 U.S.C. § 405(g) in the United States District Court for the District of Oregon. J.A. 34-38. In her prayer for relief, Forney requested that "judgment" be entered in her favor, and that the "court reverse and set aside the decision of [the Commissioner] denying [her] claim for disability benefits," or, "[*i*]*n the alternative,* that th[e] court remand the case back to the [Commissioner] for proper evaluation of the evidence or a hearing *de novo.*" *Id.* 37 (emphasis added). *See also id.* ("Plaintiff files this action requesting the Court to reverse said decision or, in the alternative, to remand this case for proper evaluation of the evidence or a rehearing *de novo* * * *."). The District Court granted outright the latter of the two forms of alternative relief pleaded; it entered a judgment in favor of Forney, setting aside the agency decision and remanding for further proceedings to "determin[e] whether claimant is entitled to benefits." Pet. App. 25; *see id.* 14.

In support of her Section 405(g) claim, Forney argued that the Commissioner's decision was erroneous for four independent, evidentiary reasons: (1) the ALJ improperly discounted the treating physician's testimony; (2) the ALJ improperly discredited Forney's pain testimony; (3) the vocational expert's testimony was based on an erroneous assumption about Forney's physical ability; and (4) the vocational expert incorrectly selected as available employment occupations requiring a residual function capacity which Forney lacks. *Id.* 21-22. Applying the "substantial

evidence" standard, the District Court rejected the first three of these arguments. *Id.* 22-24. But it accepted the fourth, and found that "the [Commissioner] has not sustained [his] burden of showing that claimant can engage in substantial gainful work in the economy, and the case must be remanded." *Id.* 25. On May 24, 1995, the District Court entered judgment in Forney's favor, "remand-[ing] to the [Commissioner] for further proceedings." *Id.* 14.[3]

Although Forney secured the judgment and relief prayed for in her complaint, she filed a timely notice of appeal. On appeal, Forney did not request reversal or vacatur of any aspect of the district court judgment in her favor. Intead, she focused her attack squarely on the *Commissioner*'s decision to deny benefits—which, of course, the District Court had already set aside—and argued that that decision was erroneous for the three additional reasons that Forney had advanced in the District Court. *See* Pet. C.A. Br. 18. With regard to relief, Forney requested in the appellate court that the "*agency's* decision should be reversed and remanded with instructions to find Forney disabled beginning June 7, 1991." *Id.* 35 (emphasis added). *See id.* 2 ("Forney appeals, and requests a finding of disability and payment of benefits * * *.").

The Court of Appeals dismissed Forney's appeal. It first concluded that, under *Sullivan* v. *Finklestein, supra,* the district court judgment must be regarded as " 'final,' in a formalistic sense." Pet. App. 10. "That fact, how-

[3] As is customary, the District Court did not specify the precise proceedings that must take place on remand. But the court stated that the "further proceedings" should be "in accordance with [its] opinion," and, as noted, that opinion specifically held that the Commissioner had erred "in determining whether claimant is entitled to benefits." Pet. App. 24. As the government has indicated, it is "likely" that the remand proceedings will involve the presentation of "additional medical evidence or testimony in support of [Forney's] application for benefits." U.S. Br. 27.

ever, does not necessarily entitle Forney to appeal the district court's decision." *Id.* Indeed, as the court explained, "[a] prevailing party normally may not appeal the decision in its favor." *Id.* And there are "compelling reasons * * * for declining to permit a claimant in Forney's position from appealing the remand order she succeeded in obtaining," including that such a claimant "may, on remand, secure *all* of the relief she seeks," rendering appellate review of the district court decision "wholly unnecessary." *Id.* 11 (emphasis added).[4] At the same time, the court cautioned, processing such an appeal could "waste judicial effort, interfere unduly with the * * * administrative agenc[y], and require * * * adjudicat[ion] on a less than full record." *Id.*

The only remaining issue was whether Forney—like the Secretary in *Finklestein*—"must be allowed to appeal th[e] issues now or [risk] forever los[ing] her right to contest them." *Id.* 12. "The answer is 'no.'" *Id.* If Forney is denied benefits on remand, she may file an action pursuant to Section 405(g), contesting any aspect of the district court decision in this proceeding. *Id.* "It is not surprising or unfair that, should Forney return to district court after being denied benefits on remand, the district court likely will adhere to its prior rulings." *Id.* But, the court emphasized, Forney would not be barred by preclusion principles from challenging those rulings in an appeal in the subsequent action, because none of those

[4] The Court of Appeals was careful to add that it was *not* presented with a situation where "a claimant is foreclosed by the district court's remand decision from part of the benefits sought." Pet. App. 10 n.5. Neither, of course, is this Court. As the Court of Appeals emphasized, "the remand order [in this case] does *not* foreclose the possibility of the claimant obtaining *all* of the relief sought [on remand]." *Id.* (emphasis in original). *See id.* 9 ("Forney possibly may obtain all the relief she seeks in the administrative proceeding on remand."). *See also* U.S. Br. 25 ("[T]he district court's remand might ultimately result in an award of all of the benefits claimed.") (internal quotation marks omitted); U.S. Cert. Resp. 9 (same).

rulings was necessary to the district court judgment in this case. *Id.*[5] Thus, in the event she does not obtain the claimed benefits on remand, Forney may obtain review of the same "rulings that we do not permit her to appeal today." *Id.* 13.

On January 16, 1998, this Court granted a writ of certiorari. 118 S. Ct. 751. Shortly thereafter, it invited amicus curiae to present argument in support of the judgment below. *Id.* at 902.

SUMMARY OF ARGUMENT

Judgments entered pursuant to Section 405(g) are "subject to review" according to the same principles governing the review of "judgment[s] in other civil actions." 42 U.S.C. § 405(g). One of those principles is that "only a party aggrieved by a judgment or order of a district court" has standing to appeal it. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). A related principle is that courts "review[] judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (internal quotation marks omitted). These principles prevent a party who has secured a judgment in her favor from appealing rulings or findings unnecessary to that judgment, even if they could possibly be adverse to the party's long-term interests. Application of these principles to Section 405(g) judgments requires the dismissal of Forney's appeal, and those like it .

[5] The court explained: "The judgment that Forney has just secured is a sentence-four remand to the Secretary. The district court's rulings against Forney on the issues of rejection of physician's testimony, discrediting of Forney's pain testimony, and inclusion of Forney's physical limitations in the expert's hypothetical questions, were all unnecessary to the remand. The remand was based solely on the error of the vocational expert in testifying that Forney could perform occupations requiring frequent or constant reaching." Pet. App. 13.

To begin with, Forney is not aggrieved by the district court judgment and, thus, lacks standing to appeal it. That judgment is entirely in Forney's favor, and grants outright one of the two forms of alternative relief prayed for in her complaint. The district court's refusal to grant the other alternative, and to order the award of the claimed benefits at this time, does not, in any event, injure Forney because it is undisputed that she may yet secure those benefits on remand. The testing of the effect of the district court judgment must abide the proceedings on remand; "only then," if Forney is denied benefits, "will [she] have been aggrieved." *Parr* v. *United States*, 351 U.S. 513, 517 (1956). The time and expense of litigating on remand—as opposed to pursuing an appeal—does not confer standing upon Forney to appeal the favorable district court judgment now. That is a necessary, if non-utopian, consequence of attempting to secure government benefits in a judicial system that lacks inexhaustible appellate resources.

Because Forney emphatically does not challenge the *judgment* in her favor, her appeal also runs afoul of the rule that courts review judgments, not statements in opinions. She seeks to appeal the District Court's refusal to adopt the three additional reasons she gave in support of setting aside the Commissioner's decision. But those rulings—embodied only by statements in the district court opinion—are not necessary to the district court judgment setting aside the agency decision and remanding for the fourth reason given by Forney, and accordingly are not subject to review in this proceeding. Moreover, the fact that these statements may be regarded on remand as "law of the case" does not make "review appropriate at this stage." *California* v. *Rooney*, 483 U.S. at 312-313. Because the challenged statements are not necessary to the district court judgment, Forney will not be precluded from challenging them in subsequent proceedings, which Forney is free to initiate if she does not obtain the claimed benefits on remand.

Practical and institutional considerations also counsel in favor of barring appeals by claimants in Forney's position. Claimants who win Section 405(g) remand orders are far more likely to secure the claimed benefits on remand than in an appeal. If they do not prevail on remand, they may obtain federal appellate review in a subsequent Section 405(g) proceeding. On the other hand, permitting immediate appeals will give hundreds or even thousands of individuals each year the option to file factually intensive and, in most cases, legally meritless appeals. There is no compelling reason to saddle the federal courts with such appeals, especially when they are likely to be rendered "wholly unnecessary" (Pet. App. 11) if claimants are required to return to the agency first. Requiring claimants who win Section 405(g) remands to follow this course also accords proper respect to SSA, the coordinate branch of government charged by Congress with the responsibility for making social security benefits determinations in the first instance.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. SECTION 405(g) JUDGMENTS ARE "SUBJECT TO REVIEW IN THE SAME MANNER AS * * * JUDGMENT[S] IN OTHER CIVIL ACTIONS."

A district court judgment remanding to SSA for further proceedings pursuant to sentence four of Section 405(g) is "subject to review in the same manner as a judgment in other civil actions." 42 U.S.C. § 405(g). That follows from the express terms of sentence four of Section 405(g)—which authorizes district courts "to enter * * * a *judgment* affirming, modifying, or reversing the decision of the Commissioner * * *, with or without remanding the cause for a rehearing," *id.* (emphasis added)—and sentence eight of that provision—which states that "[t]he *judgment* of the court shall be final

except that it shall be subject to review in the same manner as a judgment in other civil actions," *id.* (emphasis added). *See Goatcher* v. *Chater*, 57 F.3d 980, 981 (10th Cir. 1995) (adopting plain meaning construction of Section 405(g)); *O'Connor* v. *Shalala*, 23 F.3d 1232, 1233 (7th Cir. 1994) (same); *see also Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (Congress "says in a statute what it means and means in a statute what it says").[6]

Thus, as both Forney and the government acknowledge in their opening briefs, under the express terms of Section 405(g), the pertinent inquiry in determining whether Forney may appeal the district court judgment in this case is whether the judgment would be appealable by a party in Forney's position "in other civil actions." 42 U.S.C. § 405(g). *See* U.S. Br. 17 ("Under the eighth sentence of 42 U.S.C. 405(g), a sentence-four final judgment is subject to judicial review 'in the same manner as a judgment in other civil actions.' Thus, proceedings under the provision are subject to general principles of appellate review, including the requirement that a party have standing to appeal."); Pet. Br. 10-11, 12 (applying same construction); U.S. Cert. Resp. 9 (looking to "principles generally applicable to 'other civil actions'") (quoting Section 405(g)).[7]

[6] While legislative history is least probative when, as here, the meaning of the statute is plain on its face, we note that the legislative history of Section 405(g) is silent on this particular point. *See* H.R. Rep. No. 76-728, at 43 (1939); S. Rep. No. 76-734, at 52 (1939).

[7] In light of this Court's decision in *Finklestein*, 496 U.S. at 624-628, it is unclear whether sentence eight's "except" clause may be construed to qualify whether a Section 405(g) judgment is "final" in the first place. We note, however, that in other civil actions the type of remand order entered below plainly would *not* be final or appealable by a party in Forney's position. "The courts of appeals * * * have uniformly held that, as a general rule, a remand order [to an agency] is 'interlocutory' rather than 'final,' and thus may not be appealed immediately (unless, of course, it is certified pursuant to § 1292)." *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 329 (D.C. Cir. 1989); *Director, Office of Workers' Compensation Programs* v. *Bath Iron Works Corp.*, 853 F.2d 11, 13-15 (1st Cir. 1988) (per curiam) (same); *Bohms* v. *Gardner*, 381 F.2d 283, 285 (8th Cir. 1967) (opinion by Blackmun, J.). That conclusion accords with this Court's own finality precedents. *See, e.g., Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978).

The result in *Finklestein* is not to the contrary because it fits within a corollary line of cases holding, primarily for practical reasons, that administrative remand orders should be treated as if they were final when denying an immediate appeal could prevent the agency from obtaining review altogether. *See* 496 U.S. at 625 (expressing "grave doubt" as to whether agency could obtain review of adverse judgment if claimant prevailed on remand); *see also, e.g., Travis* v. *Sullivan*, 985 F.2d 919, 921-923 (7th Cir. 1993); *Travelstead* v. *Derwinski*, 978 F.2d 1244, 1247-49 (Fed. Cir. 1992); *Monongahela Valley Hosp., Inc.* v. *Sullivan*, 945 F.2d 576, 586 (3d Cir. 1991); *Colvin* v. *Sullivan*, 939 F.2d 153, 155 (4th Cir. 1991). These cases are the "exception to th[e] general rule" that remand orders are *not* final or appealable. *Occidental Petroleum Corp.*, 873 F.2d at 330. The instant case falls outside the exception because it is clear that Forney may obtain review if she does not prevail on remand. *See* Part II.C, *infra*. Thus, quite unlike the *Finklestein* paradigm, there is no compelling practical reason to treat the type of remand order here as final.

Because of the settled rule in other civil actions that administrative remand orders are not final or appealable except in the narrow *Finklestein* context, we do not agree that holding that the judgment below is non-final would be "analytically untidy." Pet. App. 9. Quite the contrary, such a ruling would square perfectly with existing precedent in other actions. Moreover, Congress' use of the qualifier "except," rather than the conjunctive "and" (or the like) immediately following "final" in the eighth sentence of Section 405(g) arguably indicates that it intended the finality of sentence-four remands to be gauged in the same manner as the finality of remands "in other civil actions." The result, if not all the language, in *Finklestein* accords with such a construction because, as explained, the type of remand in that case *is* appealable in other civil actions. In any event, even assuming the judgment below must be regarded as final under Section 405(g) and *Finklestein*, it still is not subject to review for the reasons explained in Part II, *infra*.

As we explain below, that inquiry leads to the conclusion that the Court of Appeals correctly dismissed Forney's

appeal because, in other civil actions, the judgment below would not be subject to review by a party in Forney's position.

II. IN OTHER CIVIL ACTIONS, THE JUDGMENT ENTERED BELOW WOULD NOT BE APPEALABLE BY A PARTY IN FORNEY'S POSITION.

A. Forney Is Not Aggrieved By The District Court Judgment, And Thus Lacks Standing To Appeal It.

As the government acknowledges (Br. 17-18), in other civil actions it is well settled that "only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom [under 28 U.S.C. § 1291]." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. at 333. "Th[is] rule is one of federal appellate practice, * * * derived from the federal statutes granting appellate jurisdiction and the historic practices of the appellate courts." *Id.* Under it, winning parties lack "standing" to appeal judgments in their favor, and appellate courts, in turn, lack jurisdiction to hear such appeals under Section 1291. *See id.*; *Perez* v. *Ledesma*, 401 U.S. 82, 87 n.3 (1971); *Gunn* v. *University Comm. to End the War in Viet Nam*, 399 U.S. 383, 390 n.5 (1970); *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-207 (1939) (per curiam); 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3902 (2d ed. 1992).[8]

Applying this settled rule, the Court of Appeals below correctly held that Forney lacks standing to appeal. *See*

[8] Scores of lower court precedents are to the same effect. *See, e.g., Concerned Citizens of Cohocton Valley, Inc.* v. *New York State Dep't of Envt'l Conservation*, 127 F.3d 201, 204 (2d Cir. 1997); *In re DES Litig.*, 7 F.3d 20, 23-25 (2d Cir. 1993); *In re Sims*, 994 F.2d 210, 214 (5th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994); *Showtime Networks Inc.* v. *FCC*, 932 F.2d 1, 4-5 (D.C. Cir. 1991); *Farr* v. *Gruber*, 950 F.2d 399, 401 (7th Cir. 1991); *Bath Iron Works Corp.* v. *Coulombe*, 888 F.2d 179, 180 (1st Cir. 1989) (per curiam).

Pet. App. 10-13. To begin with, Forney indisputably "won" in the District Court. In her complaint, she asked the District Court "to reverse said decision or, in the alternative, to remand this case for proper evaluation of the evidence or a rehearing *de novo*." J.A. 37. The District Court granted the alternative relief outright, entering a judgment setting aside the agency decision and remanding for further proceedings. Pet. App. 14, 25. This is, to borrow a phrase, a "substantial victory." *See* U.S. Br. in *Sullivan* v. *Finklestein*, No. 89-504, at 21 n.17 ("[T]he district court's order finding the Secretary's decision to have been legally erroneous and remanding the cause to the Secretary for further proceedings generally represents a *substantial victory* for a claimant.") (emphasis added); *see also Shalala* v. *Schaefer*, 509 U.S. 292, 302 (1993) ("A sentence-four remand, of course, is a judgment *for* the plaintiff.") (emphasis in original).[9]

It is easy to see why this is so. It is undisputed that the "remand might ultimately 'result in an award of *all* of the benefits claimed.' " U.S. Br. 25 (quoting Pet. App. 10) (emphasis added); *see* U.S. Cert. Resp. 9 (same). The receipt of such benefits, moreover, is not simply possible, it is—as the government emphasizes—*probable*. *See* U.S. Br. 28 ("claimants historically have very good prospects of fully prevailing on remand"). Statistics show that "following additional development of the record on remand, benefits are awarded in approximately 65% of Social Security cases that are remanded to the Secretary." U.S. Cert. Resp. 10 (internal quotation marks omitted); U.S. Br. 28 ("benefits are awarded in approximately 60% of Social Security cases remanded"). Furthermore, as explained below, in the event Forney does not obtain the

[9] In this regard, Forney stands in an entirely different position than the Secretary in *Finklestein*. Forney won her action; the Secretary in *Finklestein* lost. Indeed, the judgment in *Finklestein* not only set aside the Secretary's disability determination, but also "essentially invalidated * * * the Secretary's regulations." 496 U.S. at 623-625.

claimed benefits on remand, she may return to federal court and obtain review of the district court rulings she seeks to challenge here. *See* Part II.C, *infra*.

Under a common sense approach to the appellate standing inquiry, therefore, it follows that Forney was not aggrieved by the district court judgment in her favor and, accordingly, may not "exercise the statutory right to appeal therefrom." *Roper*, 445 U.S. at 333.[10]

Forney and the government nevertheless insist that Forney *is* aggrieved by the ruling below, and thus has standing to appeal it, because the District Court did not reverse "outright." Pet. Br. 18; U.S. Br. 22-23. There are several problems with this position, beginning with the fact that, at least as a matter of pleading, Forney got everything she asked for when the District Court set aside the agency decision and remanded. Federal Rule of Civil Procedure 8(a) gives plaintiffs the right to seek "[r]elief in the alter-

[10] In addition to meeting the requirements of "the [federal] statutes granting appellate jurisdiction and the historic practices of the appellate court," *Roper*, 445 U.S. at 333, Forney—like all federal court litigants—must also satisfy the requirements of Article III of the Constitution. *See Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1067 (1997) ("The standing Article III requires must be met by persons seeking appellate review"). Because, for the reasons discussed, Forney is not aggrieved by the substantial victory she secured, she no longer meets Article III's "injury in fact" requirement. *See Steel Co.* v. *Citizens for a Better Env't*, 66 U.S.L.W. 4174, 4179 (U.S. Mar. 4, 1998) (Article III requires "[f]irst and foremost, [that] there must be alleged (and ultimately proven) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not conjectural or 'hypothetical.' ") (internal quotation marks omitted); *Affiliated Ute Citizens of State of Utah* v. *Ute Indian Tribe of Uintah & Ouray Reservation*, 22 F.3d 254, 256 (10th Cir. 1994) (prevailing party lacks Article III standing to appeal judgment in its favor). But this Court need not reach that constitutional question because, as we explain, Forney lacks standing to appeal under the non-constitutional principles recognized in *Roper*. *See* 445 U.S. at 333 (rule that prevailing parties may not appeal "does not have its source * * * in Art. III," but rather in statutory and common law principles).

native." Fed. R. Civ. P. 8(a). Forney did just that: she asked the court "to reverse * * * or, *in the alternative*, to remand * * *." J.A. 37 (emphasis added). "[H]aving received the alternative relief [she] requested, [Forney] cannot now complain that the court did not grant [the other alternative]." *Star Fin. Servs., Inc.* v. *AASTAR Mortgage Corp.*, 89 F.3d 5, 12 (1st Cir. 1996).[11] Because Forney in fact "receive[d] all that [s]he has sought," she "is not aggrieved by the judgment affording relief and cannot appeal from it." *Roper*, 445 U.S. at 333.[12]

In any event, Forney is not aggrieved by the District Court's refusal to grant the other form of alternative relief and to order that she is entitled to the requested benefits outright because, as all agree, she may yet secure those benefits on remand. Unless or until Forney is denied those

[11] *See also Southern Natural Gas Co.* v. *FERC*, 877 F.2d 1066, 1070 (D.C. Cir. 1989) (petitioner that received one of two forms of alternative relief was not "aggrieved by [agency]'s rejection of [one alternative] in any way that is redressible by this court"); *United States* v. *Ligori*, 658 F.2d 130, 134 (3d Cir. 1981) (Higginbotham, J., concurring) ("[party] received the alternative relief which he requested and is entitled to no more"); *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976) ("motion [was] moot because [movant] had obtained the full measure of the alternative relief requested"); *Manufacturers Credit Corp.* v. *SEC*, 395 F.2d 833, 846 (3d Cir. 1968) (parties lack standing to appeal order that grants one form of alternative relief, while preserving opportunity to secure other alternative in later proceedings).

[12] Both Forney (Br. n.4) and the government (Br. 22) belatedly and self-servingly characterize Forney's remand request as "alternative and *lesser*" relief. (Emphasis added.) No such characterization was made in Forney's actual prayer for relief; in pertinent part, the complaint simply requests one of two alternative forms of relief—(A) reversal, or (B) an order setting aside the agency decision and remanding for another hearing. *See* J.A. 37. Only after the District Court granted alternative B did Forney insist upon alternative A.

benefits on remand, she is not injured by a judgment that presents her with the opportunity to secure the requested relief in its entirety.

This is the lesson of *Parr* v. *Uni.. d States, supra.* In that case, a criminal defendant (Parr) sought to appeal the dismissal of an indictment, over his "vigorous opposition," with the dismissal followed by a subsequent indictment and trial in a foreign district. 351 U.S. at 515 & n.7. Emphasizing that "[o]nly one injured by the judgment sought to be reviewed can appeal," Justice Harlan, writing for the Court, explained that "an appeal from [the indictment's] dismissal will not lie." *Id.* at 516. Parr was not "injured" by the dismissal order because it was "in his favor." *Id.* at 517. "So far as [Parr]'s standing to appeal is concerned," the Court explained, "it makes no difference [that] the dismissal still leaves him open to further prosecution." *Id.* "The testing of the effect of the dismissal order must abide [Parr]'s trial, and *only then,* if convicted, will he have been aggrieved." *Id.* (emphasis added). The fact that this forced Parr "to hazard a trial under the [second] indictment before he can get a review of whether he should have been tried * * * under the [first] indictment" did not alter the result. *Id.* at 519.

Here, too, the testing of the effect of the district court judgment in Forney's favor must abide the proceedings on remand. "[O]nly then," if Forney is denied the benefits she claims the District Court should have awarded outright, "will [s]he have been aggrieved" by the judgment. *Id.* at 517. Moreover, as in *Parr,* the fact that this conclusion subjects Forney to the time and expense of additional proceedings on remand does not confer standing upon her to appeal from the judgment setting aside the agency decision. Indeed, any burden borne by Forney in this regard is slight in comparison to the "discomfiture and costs of a *prosecution* for crime," which Parr faced before he would possess standing to obtain review of the

favorable order he claimed aggrieved him. *Id.* at 519-520 (emphasis added). At this point, in other words, any "injury" stemming from the District Court's refusal to order an immediate award of the claimed benefits is simply too speculative to confer standing upon Forney to appeal.

The rationale of *Parr* accords with lower court decisions holding that parties who succeed in obtaining an agency decision reversing and remanding for further administrative proceedings are not sufficiently "aggrieved" to obtain federal court review. Thus, for example, in *CH2M Hill Central, Inc.* v. *Herman,* 131 F.3d 1244 (7th Cir. 1997), a company petitioned under 29 U.S.C. § 660(a) for review of an order issued by the Occupational Safety and Health Review Commission (Commission), reversing an ALJ ruling that the company was not subject to penalties and remanding for further proceedings that might result in imposition of penalties. Section 660(a) permits "[a]ny person adversely affected or aggrieved by an order of the Commission" to appeal the order directly to a federal circuit court. *Id.* Writing for the court, Judge Easterbrook had little difficulty in concluding that the company did not meet that standard. As he put it, "[f]or all we know [the company] will prevail on remand, and the Commission's opinion will cause it no injury—none, that is, beyond the cost of litigation (which does not permit review) * * *." 131 F.3d at 1247. The same, of course, is true with respect to Forney's situation here.[13]

---

[13] *Cf. Director, Office of Workers' Compensation Programs* v. *Bath Iron Works Corp.,* 853 F.2d at 14 ("Because the [agency] did not purport definitively to resolve the controversy between the parties, but instead remanded to the ALJ for further proceedings, the present order did not close out the case. No legal consequences flowed directly and inexorably from it. To the contrary, the order contemplated that something further needed to be done."); *United States Office of Personnel Management* v. *FLRA,* 905 F.2d 430, 435 (D.C. Cir. 1990) (Silberman, J., concurring) (parties successful before the agency did not become aggrieved until agency in fact changed its position after remand); *Stripe-A-Zone* v. *Occupational*

While relegating *Parr* to a naked *"But cf."* citation (U.S. Br. 21 n.11), the government cites several lower court cases for the proposition that courts "routinely entertain appeals by parties who prevailed on the merits but were nonetheless aggrieved because they did not obtain all the relief they requested." *Id.* 21 n.12. In none of these cases, however, did the appellant still have the opportunity to secure the denied relief on remand, or in other proceedings yet to come. Instead, in each of the cited cases, the district court had denied the requested relief, there was no opportunity left to obtain that relief, and the only avenue of challenging the denial was immediate appellate review. These cases are wholly inapposite where, as here, the challenged decision affords the appellant an opportunity to secure all the relief to which she claims she is entitled in further proceedings expressly contemplated by the challenged decision.[14] Accordingly, they do not alter the con-

Safety & Health Review Comm'rs, 643 F.2d 230, 233 (5th Cir. 1981) (per curiam) (dismissing petition for review of agency remand order on ground that petitioner with opportunity to prevail on remand was not "aggrieved").

[14] *Deposit Guaranty National Bank* v. *Roper*, *supra*, is distinguishable on similar grounds. In that case, the Court held that class action plaintiffs had standing to appeal denial of class certification, even though judgment had been entered in the plaintiffs' favor. The Court grounded its standing holding on the fact that, if the class were certified, plaintiffs would be able to shift part of the litigation costs to other class members. *See* 445 U.S. at 334 n.6. The significant financial consequences of the order denying certification were fixed; there was no opportunity for the plaintiffs in *Roper* to challenge that ruling in further proceedings yet to come.

Roper is distinguishable in two additional respects. First, the judgment in that case was entered "over [plaintiffs'] continued objections," as the result of the defendant's decision to tender the requested relief to plaintiffs individually, rather than face a class action. *Id.* at 332. The appellant in this case, by contrast, specifically requested the judgment she received, albeit in the alternative. Second, the plaintiffs in *Roper* sought to appeal only to obtain review of a "procedural error, *not for the purpose of [challenging] the merits of the substantive controversy*," and the Court specifically limited plaintiffs' right to appeal as such. *Id.* at 336 (em-

clusion that Forney lacks standing to challenge the remand order she secured.[16]

B. Forney Does Not Challenge The District Court Judgment, But Rather Statements Unnecessary To That Judgment.

Forney's appeal also runs afoul of another basic principle governing appeals in other civil actions: courts "review[] judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. at 311 (internal quotation marks omitted). *See* U.S. Br. 18; *Chevron U.S.A., Inc.* v.

phasis added). The appellant here, by contrast, seeks review *only* of issues going to the "substantive controversy."

[15] Contrary to the suggestion of Forney (Br. 24), it is by no means clear that outright reversal is even available relief in this case. In reviewing a decision to deny benefits under Section 405(g), a federal court may not reweigh the evidence or make *sua sponte* disability determinations; Congress vested that responsibility in the agency. *See, e.g., Nelson* v. *Apfel*, 131 F.3d 1228, 1234 (7th Cir. 1997); *Hays* v. *Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). Thus, as the government observes (Br. 29), outright reversal is available "only in limited circumstances," such as where "all essential factual issues have been resolved." *Faucher* v. *Secretary of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994). Due to the nature of the challenges made and the record developed in this case, outright reversal—as the government has argued all along—is simply not feasible. *See* U.S. Br. 25 n.15; U.S. C.A. Br. 14-22. Indeed, even with respect to the argument that Forney won below, a remand is plainly necessary so that additional evidence may be taken on whether employment opportunities exist for someone *with* Forney's ability. A federal court (especially an appellate one) may not simply make that determination *de novo*. *See FPC* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952) (court lacks "power to exercise an essentially administrative function"); *Faucher*, 17 F.3d at 176 (remand required where vocational expert's testimony was based on erroneous assumption as to claimant's ability). Similarly, the other issues raised by Forney—especially those concerning witness credibility findings, *see* Pet. App. 21-22—are scarcely the type of challenges that, even when credited, lend themselves to outright reversal by a court lacking the authority to reweigh the evidence.

NRDC, Inc., 467 U.S. 837, 842 (1984) ("since this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment") (footnote omitted); *Hutto* v. *Davis*, 454 U.S. 370, 384-385 n.2 (1982) (per curiam) ("[T]his Court reviews judgments, not opinions, and therefore can reverse [a] judgment * * * only if it is not sustainable on any basis."); *accord Owens-Illinois, Inc.* v. *Aetna Cas. & Sur. Co.*, 990 F.2d 865, 875 (6th Cir. 1993). This rule prevents a party such as Forney who has secured a favorable judgment from bringing an appeal arguing that the court should have decided the case based on additional or alternative reasons than those set forth in the opinion accompanying the judgment.[16]

Thus, in *California* v. *Rooney*, *supra*, this Court declined to review a state court decision holding that evidence found in a trash bin was insufficient to establish probable cause for a search warrant, where the decision held that probable cause was established on other grounds. As the Court observed, "the judgment of the Court of Appeal was entirely in the State's favor—the search warrant which was the sole focus of the litigation was deemed valid." 483 U.S. at 311. "The fact that the Court of

[16] The rule that courts only review judgments is based on the same principles undergirding the appellate standing doctrine. As a result, courts often invoke both principles in dismissing appeals. *See, e.g., Concerned Citizens of Cohocton Valley, Inc.* v. *New York State Dep't of Envt'l Conservation*, 127 F.3d at 204 ("[I]f a court grants the ultimate relief a party requested, even though on grounds other than those urged by the prevailing party, that party is generally not 'aggrieved' by the judgment and may not appeal.") (citation omitted); *Penda Corp.* v. *United States*, 44 F.3d 967, 972 (Fed. Cir. 1994) ("Courts * * * have not recognized standing to appeal where a party does not seek reversal of the judgment but asks only for review of unfavorable findings."), *cert. denied*, 514 U.S. 1110 (1995); *Allstate Ins. Co.* v. *A.A. McNamara & Sons, Inc.*, 1 F.3d 133, 137 (2d Cir. 1993) (appellant lacks standing where she "is not urging that we alter the judgment in any way, but rather that we alter the reasons underlying it").

Appeal reached its decision through analysis different than this Court might have used does not make it appropriate * * * for the prevailing party to request us to review it." *Id.* Moreover, the fact that the reasons given by the lower court for reaching its judgment "may [be] adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of th[e] Court's review." *Id.*

Forney's appeal fails under the reasoning of *Rooney* and similar cases because she emphatically does *not* seek to appeal the district court judgment in her favor. *See* Pet. Br. 28 ("Petitioner seeks to appeal *not* from the remand order itself, but from the adverse rulings on issues upon which the district court *declined* to grant relief.") (emphasis in original). The "adverse rulings on issues" (*id.*) that Forney does seek to appeal consist of the District Court's refusal to credit the three additional, evidentiary arguments she made in support of her claim. But those rulings are not found in—and are not necessary to —the district court judgment setting aside the Commissioner's decision based on the *fourth* argument Forney made for doing so. *See* Pet. App. 14.[17] Rather, they are

[17] As the Court of Appeals found, the district court judgment "was based solely on the error of the vocational expert in testifying that Forney could perform occupations requiring frequent or constant reaching," Pet. App. 13, just as the judgment in *Rooney* was based solely on the non-trash evidence offered to establish probable cause. None of the findings or rulings that Forney seeks to challenge here was necessary to that judgment; indeed, those rulings—which reaffirm aspects of the Commissioner's decision—are *contrary* to the judgment setting aside that decision. *See id.*, quoted note 4, *supra*; *Fletcher* v. *Atex*, Inc., 68 F.3d 1451, 1458 (2d Cir. 1995). *See also* 18 Wright & Miller, *supra*, § 4421, at 199 ("findings that are contrary to the judgment in the sense that, standing alone, they would conduce to an opposite judgment * * * have long been accepted as paradigms of * * * *unnecessary* conclusions [to the judgment]") (emphasis added). This should come as little surprise: "a finding adverse to an otherwise fully prevailing party will *rarely* be necessary to the judgment." 20 James W. Moore, *Moore's Fed-*

simply statements in the district court opinion, which, under the settled rule, are not by themselves appealable.

Forney argues (Br. 18, 28 & n.16) that she must be permitted to appeal these statements because they may adversely affect her on remand.[18] That is to say, *if* Forney does not obtain the claimed benefits on remand, and *if* she then tries to argue that she is entitled to those benefits for the three additional reasons the District Court rejected, she contends she is likely to be barred from doing so under the "law of the case" doctrine. Pet. Br. 28 n.16; *see* U.S. Br. 24. As this Court held when confronted with essentially the same argument in *Rooney*, however, "[t]here are two too many 'ifs' in that proposition to make * * * review appropriate at this stage." 483 U.S. at 312-313. Moreover, as in *Rooney*, "[e]ven if everything [Forney] fears comes to bear," *id.*, she will have an opportunity to seek review in subsequent proceedings. *See* Part II.C, *infra*. The fact that the district court decision is likely to be treated as "law-of-the-case" in the meantime "provides no justification for * * * granting review at this stage." 483 U.S. at 312 n.2.

Furthermore, the notion that a party is entitled to immediate review of any ruling that may "affect the character of * * * further proceedings" (U.S. Br. 23) is far-fetched. Courts routinely make rulings that have as much and, in-

---

eral Practice and Procedure ¶ 303.10[2][b], at 303-20 to 303-21 (3d ed. 1997) (emphasis added).

[18] The government seems to take conflicting positions on this point: on the one hand, it argues that Forney has standing to appeal because she will be "adversely affected by the[] rulings in the course of further proceedings," U.S. Br. 24, but, on the other hand, it posits that Forney "is entitled to appeal the court's remand order, *not because of putative preclusive effects*, but because [Forney] challenges a final judgment that did not grant her all the relief she requested." *Id.* 31 (emphasis added). It is unclear which of these seemingly juxtaposed positions is the government's bottom line.

deed, far greater impact on the course of future proceedings than the type of evidentiary rulings Forney seeks to challenge here, including rulings dismissing claims outright, *e.g.*, *Jefferson* v. *City of Tarrant*, 118 S. Ct. 481 (1997), and directing dispositive findings, *e.g.*, *Baker* v. *General Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), *rev'd on other grounds*, 118 S. Ct. 657 (1998). Yet the fact that this requires parties to endure the time and expense of having to litigate under such terms before obtaining appellate review is invariably deemed to be insufficient to render their objections immediately appealable, so long as the parties eventually will have an opportunity to obtain such review, as all agree Forney will here.[19] The ever burgeoning workload of the appellate courts demands such a rule. *See infra* at 31-32.

The particular manner in which Forney framed her appeal also underscores the impropriety of that appeal under the rule that courts only review judgments. Nowhere in her appellate brief did she ask the Court of Appeals to reverse or vacate the district court judgment. *Cf. In re DES Litig.*, 7 F.3d at 25 (dismissing appeal where, as here, "appellate brief does not ask [court] to

---

[19] *Cf. Jefferson* v. *City of Tarrant*, 118 S. Ct. at 486 ("however incorrect" state court's dismissal of federal civil rights claim may be, plaintiffs must proceed with trial on state law count before they may challenge in Supreme Court dismissal of the federal count); *Parr* v. *United States*, 351 U.S. at 519 (plaintiff must "hazard a trial under the [second] indictment before he can get a review of whether he should have been tried in [his home district] under the [first] indictment"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Opinion of Scalia, J., respecting denial of petition for writ of certiorari) (state must complete elaborate process of developing plan to cure constitutional violation before it may obtain review of question whether violation exists in first place); *CH2M Hill Central, Inc.* v. *Herman*, 131 F.3d at 1247 (company facing administrative penalties must complete remand proceedings before it may obtain review of standard under which remand is conducted).

vacate any portion of the *judgment*") (emphasis in original). The reason is simple: the judgment was entirely in her favor. Instead, Forney directed her appeal to the *Commissioner's* decision to deny benefits and, when it came to stating the requested relief, she asked that the "*agency's* decision be reversed and remanded with instructions to find Forney disabled beginning June 7, 1991." Pet. C.A. Br. 35 (emphasis added). But the Court of Appeals could do no such thing. Except where Congress directs otherwise, the federal courts of appeals sit to review district court judgments, not agency decisions. That is the case here. Section 405(g) is addressed explicitly to the "district court[s]"; it confers no special powers on the courts of appeals. 42 U.S.C. § 405(g). *See O'Connor* v. *Shalala*, 23 F.3d at 1234 (Section 405(g) confers remedial authority on district courts, not courts of appeals).

Finally, contrary to the suggestion of the government (Br. 31-32), this Court's decision in *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939), is of no avail to Forney. In that case, the Court held that a prevailing party may have standing to appeal a judgment in its favor in the narrow circumstance where the "decree itself" purports to adjudicate an issue adversely to the prevailing party. *Id.* at 242. In such circumstances, the Court held, the prevailing party may appeal "to have *this portion of the decree* eliminated," and the court of appeals has "jurisdiction * * * to entertain the appeal, *not for the purpose of passing on the merits*, but to direct reformation of the decree." *Id.* (emphases added). Forney does not come within, or even close to, the rule of *Electrical Fittings* because she does not challenge any aspect of the district court judgment (and the rulings she does challenge are neither contained within nor necessary to that judgment), but instead seeks to appeal solely for the purpose of having the court "pass[] on the merits" (*id.*) of her benefits claim. *See supra* at 21; *Concerned*

Citizens of Cohocton Valley, Inc., 127 F.3d at 205 n.3 (distinguishing *Electrical Fittings* on similar grounds); *In re DES Litig.*, 7 F.3d at 25 (same).[20]

This Court's decision in *Electrical Fittings* is nevertheless instructive because it helps explain why Forney's (Br. 17-18) and the government's (Br. 19-20) reliance on *United States* v. *Jose*, 117 S. Ct. 463 (1996) (per curiam), is misplaced. In *Jose* the Court reinstated an appeal by the Internal Revenue Service ("IRS") from a district court decree which, while upholding the agency's authority to enforce a summons, " 'require[d] [it] to give [the subject of the summons] five days notice if it decides to circulate or transfer the summonsed documents.' " Pet. App. in *United States* v. *Jose*, No. 95-2082, at 19a (district court decree); *see* 117 S. Ct. at 464. The appeal was aimed solely at the five-day notice requirement. Because that requirement was not only necessary to but contained within the "decree itself," the IRS was entitled to bring an appeal "to have this portion of the decree eliminated." *Electrical Fittings*, 307 U.S. at 242. That result, however, does nothing to advance Forney's case: the rulings she challenges are neither contained within nor necessary to the judgment in her favor. *See* Pet. App. 14.

Jose is distinguishable in another significant respect. The appellant in *Jose* was obviously aggrieved by the district court decree imposing the notice requirement. As the government explained in its petition for a writ of certiorari

---

[20] As this Court observed in *Roper*, the result in *Electrical Fittings* is explainable on an alternative basis, which also distinguishes it from this case: "[i]n a sense, the petitioner in *Electrical Fittings* sought review of * * * [a] procedural error," "not * * * the merits of the substantive controversy," and the Court determined that it was important, "for policy reasons," to allow the appeal to proceed. 445 U.S. at 335-336 & n.7. The appeal in this case, by contrast, is directed squarely to the merits of the "substantive controversy" —not any procedural error—and, as discussed in Part III, *infra*, policy considerations cut decisively against allowing it.

in that case, the decree's notice requirement "imposes injunctive restrictions on the internal use of summoned information by the [IRS]." Pet. 10. "If the government does not comply with the injunction, its attempt[] to disclose the documents would be punishable by contempt." *Id.* 13 n.4 (internal quotation marks and emphasis omitted; brackets in original). The district court judgment in this case, by contrast, imposes absolutely no restrictions (injunctive or otherwise) on Forney, and certainly does not subject her to possible criminal liability. Quite the contrary, the judgment presents her with an opportunity to secure the very benefits she seeks. Thus, to the extent that *Jose* sheds any light on the appellate standing question in this case, it simply underscores that Forney is *not* aggrieved.[21]

C. The Challenged Statements Are Reviewable In Later Proceedings If Forney Does Not Prevail On Remand.

Forney (Br. 13-14, 25) argues that she must be entitled to bring the instant appeal because a sentence-four remand "terminate[s] the civil action." *Sullivan* v. *Finklestein*, 496 U.S. at 625; *accord Shalala* v. *Schaefer*, 509 U.S. at 299. While it is true that the judgment below terminates this action, this should have no bearing on Forney's standing to appeal it. If a party lacks standing to appeal because she is not aggrieved by a judgment, or impermissibly seeks to challenge findings or rulings unnecessary to that judgment, standing is not automatically conferred simply because dismissal of the appeal will result in the termination of the underlying action. *See, e.g., Parr*

[21] While *Jose* is instructive in this regard, we note that the Court's summary disposition in that case was in fact based on "ripeness," not appellate standing principles. *See* 117 S. Ct. at 464-465. Indeed, the government itself framed the question presented in *Jose* solely in terms of "ripeness." *See* Pet. (I). The government's and Forney's reliance on *Jose* in the instant case is misplaced for this reason, too.

v. *United States*, 351 U.S. 513 (no standing to appeal order that results in termination of criminal proceeding); *In re DES Litig.*, 7 F.3d 20 (no standing to appeal order that results in termination of civil action); *Balcom* v. *Lynn Ladder & Scaffolding Co.*, 806 F.2d 1127 (1st Cir. 1986) (per curiam) (same). The appellate standing doctrine, in other words, is not subject to the exception that every party is entitled to one appeal per action; such an exception would swallow the rule.[22]

The pertinent point—which is not disputed by Forney or the government, and which distinguishes this case from *Finklestein*—is that, in the event Forney is aggrieved by the subsequent rulings below (*i.e.*, if she does not obtain the claimed benefits on remand), she will have an opportunity at that time to obtain review of the unnecessary statements or rulings she seeks to appeal here. As the Court of Appeals explained, if Forney does not obtain the requested benefits on remand, she may initiate a second Section 405(g) action challenging the Commissioner's decision. *See* Pet. App. 12-13. In that proceeding, "the district court will likely adhere to its prior rulings." Pet. App. 12; *see supra* at 22. But nothing will prevent Forney from obtaining appellate review in the second ac-

[22] Forney (Br. 18, 22) cites *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 12 (1983), and *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), in support of her argument that, because the district court judgment terminates the action, she must be entitled to review here. But those cases turned in relevant part on finality—not standing—principles. There was no question in either case that the parties seeking to appeal were aggrieved by the lower court judgments at issue. *See* 460 U.S. at 7, 12 (refusing appellant's request to stay arbitration and stay federal action for completion of state proceedings that would dispose of federal action); 370 U.S. at 304 (ordering appellant to divest itself of merged assets). In *Moses H. Cone*, moreover, the Court emphasized that "the order [at issue] would be entirely unreviewable if not appealed now." 460 U.S. at 12. Neither case, accordingly, sheds any light on the question whether a prevailing party in Forney's position is entitled to appeal the judgment in this case.

tion of "the issues decided against her in her first, final civil action, in which she 'prevailed.'" Pet. App. 12.

This follows from two settled principles of preclusion law: *first*, a party may not be bound by rulings she was not permitted to appeal, *see id.*; *Restatement (Second) of Judgments* § 28(1) (1982) (preclusion unavailable where "party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action") (collecting cases); and, *second*, a party may only be bound by rulings that are necessary to the judgment in the prior case, *see* Pet. App. 12-13; 18 Moore, *supra*, § 132.03[4][a], at 132-105 ("Relitigation of an issue * * * in a prior case * * * is not foreclosed if the decision of the issue was not necessary to the judgment reached in the prior litigation.") (collecting cases). In light of these principles, it is settled that a prevailing party may not be bound in a subsequent action by unnecessary rulings or findings contained in the decision resulting in judgment in the party's favor in the prior action.[23]

The fact that the opportunity for review would arise in a "new civil action" (Pet. Br. 13) does not alter the conclusion that Forney lacks standing to appeal in this proceeding. *Cf. Parr* v. *United States*, 351 U.S. at 515 (de-

[23] *See, e.g., Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99 n.6 (1954) ("when a finding of law or fact is not necessary for a decree * * * the prevailing party may not appeal and the finding does not form the basis for collateral estoppel"); *Gelb* v. *Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986) ("a winning party may not appeal issues determined adversely to it by the trial court and, as a consequence, is not barred from relitigating such issues [later]"), *cert. denied*, 480 U.S. 948 (1987); *Balcom* v. *Lynn Ladder & Scaffolding Co.*, 806 F.2d at 1127 ("short and conclusive answer" to winning party's concern about adverse finding in favorable judgment "is that the challenged finding has no collateral estoppel effect, for it was not essential to the favorable judgment"); 18 Wright & Miller, *supra*, § 4433, at 317 (1st ed. 1981) (same).

fendant lacks standing to appeal from dismissal of criminal indictment, even though any challenge to that dismissal would have to be brought in an appeal from a "new indictment" in a separate proceeding). Indeed, it is invariably the case that, unless a prevailing party is entitled to immediate review of unnecessary rulings or findings contained in an opinion accompanying a final, appealable judgment in its favor, the party will be forced to challenge them in a separate action—in the event, that is, such rulings or findings in fact are later asserted against the party. *See, e.g.*, cases cited at note 23, *supra*. But "it has been concluded that it is better to deny appeal and forbid preclusion than to permit appeal in order to support preclusion." *See* 15A Wright & Miller, *supra*, § 3902, at 83 & n.43 (1992). There is no reason to adopt a different practice here.[24]

III. PRACTICAL AND INSTITUTIONAL CONSIDERATIONS COUNSEL IN FAVOR OF HOLDING THAT A PARTY IN FORNEY'S POSITION MAY NOT APPEAL.

Because the district court judgment below is not appealable under the principles governing the review of judgments in other civil actions, it is not appealable in this Section 405(g) action either. *See* Part I, *supra*. The Court need not go any further and, indeed, in light of Congress' express direction that Section 405(g) judgments are "subject to review in the *same* manner as a judgment

[24] Forney's argument also elevates form over substance. As the government has observed, "[a]lthough the second round of judicial review would be a new civil action in court, there is but *one* underlying administrative proceeding before the Commissioner on but *one* application for benefits." *See* U.S. Br. 33 (emphasis added). In other words, while the two Section 405(g) actions may be distinct, there is no practical reason to treat the second action any differently, for present purposes, than a second appeal in the same administrative proceeding concerning the same application for social security benefits.

in other civil actions," 42 U.S.C. § 405(g) (emphasis added), should not go any further in deciding this case. Nevertheless, contrary to the suggestion of the government (Br. 26-34), policy considerations support, not undermine, the conclusion that a party in Forney's position may not appeal.

After devoting most of its efforts to arguing that claimants in Forney's position should be entitled to appeal, the government switches its tack and argues that the practical consequences of such a ruling would be negligible because virtually no claimant in Forney's position would *want* to appeal. *See* U.S. Br. 26-29. Thus, for example, the government observes that claimants who win sentence-four remands are far more likely to obtain the claimed benefits on remand (60-65% of such claimants do) than they are to secure outright reversal in an appeal (very few do), *id.* 27; U.S. Cert. Resp. 10;[25] and that such claimants are likely to obtain the requested benefits "more quickly through the [remand] proceedings," U.S. Br. 27-28, than through "a time-consuming appeal," U.S. Cert. Resp. 10 (internal quotation marks omitted).[26] These considera-

[25] One of the factors accounting for this success rate is the fact that remand proceedings—quite unlike federal court appeals—not only allow the decisionmaker to reweigh the facts, but typically permit an opportunity for the claimant to present new or additional evidence in support of her claim. *See* U.S. Br. 27. As the government has explained, the opportunity to present such evidence—which Forney herself is "likely" to have—often is of "substantial strategic or practical" value to claimants. U.S. Br. 27.

[26] For example, the appeal in this case was noticed on June 5, 1995 (C.A. E.R. 258) and was not finally disposed of by the Court of Appeals until May 29, 1997 (Pet. App. 41), nearly two years later. By contrast, sentence-four remands are, according to the government, typically processed "within a year." U.S. Br. 28. Given this discrepancy, the *claimant* in *Finklestein* strenuously opposed the Secretary's effort to appeal and, thus, "to inject yet a *sixth* level of routine proceedings into the Social Security process," adding that "[t]he burden imposed by * * * delay during [such] appellate review * * * [would be] unbearable." Resp. Br. in *Sullivan* v. *Finklestein*, No. 89-504, at 47 (emphasis added).

tions, however, cut *in favor of*, not against, requiring claimants in Forney's position to return to the agency to secure their benefits before burdening the courts of appeals with factually intensive but, most commonly, legally meritless appeals. Presumably, that is why the government proclaims that a rule *requiring* claimants in Forney's position to appeal would be "unfair." U.S. Br. 34 n.20.

The government (Br. 29-34) also hypothesizes that claimants in Forney's position normally will forego available appeals because they should not have to worry about the preclusive effect of the district court judgment in their favor in subsequent proceedings. Here again, however, the government has it backwards. Under settled doctrine, a party who foregoes an *available* appeal risks being precluded by the judgment in subsequent proceedings. *See Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. at 99 & n.6; *supra* at 28. And the prospect of such preclusion of course provides a powerful incentive to appeal. The government recognizes this fact (*see* Br. 29-30) and, to remedy it, urges this Court to exercise its "equitable * * * discretion" and establish a special exception to existing preclusion doctrine, so that claimants in Forney's position will not feel compelled to appeal judgments in their favor. *Id.* 32 (internal quotation marks omitted). It is, however, entirely unnecessary to complicate existing preclusion rules by the creation of such an exception if the Court simply applies the settled principles applicable in other civil actions, and holds that a party in Forney's position may not appeal.

In any event, it is obvious why the government urges the Court to go to such lengths to ensure that claimants in Forney's position do not routinely pursue appeals of sentence-four remands. If they did, it could lead to a significant influx of new appeals in an already overburdened appellate court system. *See* Hon. William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary* 4 (Jan. 1, 1998) ("Since December 1990, * * * the number of cases filed in courts of appeals has grown by 21%

* * *."); *id.* at 11 n.4 (in 1997, "a record level of more than 52,300" appeals were filed, including a 56% increase in "administrative agency appeals"); *see also* Diana G. Culp, *Fixing the Federal Courts*, 76 A.B.A. J. 63, 63 (June 1990) ("Since 1945 * * * the number of appeals [in the federal courts] has risen nearly 15-fold, by 1,355 percent."); *Board of Trustees* v. *Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting) (noting that "circuit judges—more than any other segment of the federal judiciary—are struggling desperately to keep afloat in the flood of federal litigation").

"The Social Security Administration (SSA) hearing system * * * is probably the largest adjudicative agency in the western world." Jerry L. Mashaw *et al.*, *Social Security Hearings and Appeals* xi (1978). Hundreds of thousands of claims for social security benefits are processed by SSA each year, an amount that exceeds the total number of civil and criminal actions closed by the entire federal judicial system each year. *Id.*; SSA, *Annual Statistical Supplement, 1997* 137, Table 2.F9 (Dec. 1997) (605,000 hearing dispositions in 1997 in all SSA cases; 188,737 in disability cases). Thousands of those agency decisions, in turn, are challenged each year in federal district courts across the country pursuant to 42 U.S.C. § 405(g). *See Statistical Supplement*, *supra*, at 137, Table 2.F10.

In fiscal year 1996, for example, 8,556 new civil actions were filed in federal district court challenging the denial of social security benefits, virtually all of which involved challenges to the denial of disability benefits. *Id.* While precise data on the number of remands issued in such actions apparently does not exist, *see id.*, other SSA reports indicate that remand orders are commonly issued in Section 405(g) actions. *See* Div. of App. Assessment of the Off. of Policy & Procedures, SSA Off. of Hearings & App., *Court Remands: Analysis & Recommendations* 4 (Dec. 1987) (between 1984 and 1989, remands com-

prised 43-63% of district court dispositions).[27] In other words, the available statistics suggest that each year there are apparently thousands of parties in Forney's position, who have secured a sentence-four remand and, if the government and Forney are correct, are entitled to bring an immediate appeal.

We have been unable to locate statistics on the number of parties in Forney's position who have actually filed such appeals in the past. (The government suggests the number is quite small. *See* U.S. Br. 27 n.16.) But such statistics would be of little moment in any event, since the pertinent question is how many claimants in Forney's position are likely to file appeals if the Supreme Court of the United States issues a decision holding that such parties are entitled to bring an appeal taking another shot (however far-fetched) at outright reversal. Unlike the government, we believe this number could be substantial, especially from the perspective of the already-overburdened courts of appeals that would be forced to process these appeals. Cause for concern is heightened if the Court does not establish the new, "equitable" exception to preclusion principles that the government urges it to create in order to stem the tide of such appeals. Indeed, even the government acknowledges that any ruling that "encourage[s] litigants to seek immediate judicial review of sentence-four remand orders * * * would promote unnecessary appellate litigation." U.S. Br. 34.

From the standpoint of judicial economy, there seems to be little reason to subject the federal courts of appeals to this additional workload. Appeals in social security disability are typically factually intensive, as the briefs filed by the parties below aptly illustrate. At the same time, claimants "face an uphill battle" in the courts of appeals, since, by the time such cases reach the appellate

---

[27] This report does not differentiate between sentence-four and sentence-six remands, but, according to the government (Br. 11 n.6), "the vast majority of remands ordered under Section 405(g) are entered pursuant to sentence four."

court, "the Commissioner and the district court [already] have each concluded that the existing administrative record was insufficient to warrant an immediate award of benefits," U.S. Br. 28, and review of such matters is only available under the deferential, substantial-evidence standard. There is good reason to conclude, therefore, that—as Judge Friendly observed in a similar vein—"the likelihood of reversal is too negligible to justify the delay and expense incident to an appeal and the consequent burden on hardpressed appellate courts." *Donlon Indus., Inc.* v. *Forte*, 402 F.2d 935, 937 (2d Cir. 1968). The fact that many, if not most, of these appeals would be rendered "wholly unnecessary" (Pet. App. 11) if claimants were required to complete remand proceedings first provides another—independently compelling—reason to deny the type of appeal filed here.

On the other hand, neither the government nor Forney has offered any compelling practical reason for permitting such appeals to go forward, and we are aware of none. Having secured a Section 405(g) remand order, parties in Forney's position not only are entitled to attorney's fees and expenses, *see Shalala* v. *Schaefer*, 509 U.S. at 303, but stand a 60-65% chance of obtaining the claimed benefits before the agency on remand, compared with very little chance of succeeding in the court of appeals, and are even likely to obtain those benefits "more quickly" by returning to the agency first. *See* U.S. Br. 27; *supra* at 30. There is, moreover, little practical disadvantage to pursuing the remand route first, since, if a claimant does not secure the claimed benefits on remand, she may then return to federal court and challenge the district court rulings in the prior proceeding, as well as the Commissioner's decision to deny benefits on remand. And, if she is successful in doing so, she may obtain attorney's fees and expenses for the additional proceedings on remand.

There is, of course, time and expense associated with litigating a claim for benefits on remand. In similar contexts, however, this Court has made clear that such considerations are secondary to the overriding institutional interest in judicial economy—even when that means requiring an individual to "hazard" a criminal trial with no less than his personal liberty at stake. *Parr* v. *United States*, 351 U.S. at 519; *supra* at 23. *Cf. FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) ("[T]he expense and annoyance of litigation is part of the social burden of living under government.") (internal quotation marks omitted). Especially when weighed against the countervailing considerations discussed above—not to mention the time and expense involved with prosecuting "uphill battle[s]" in the courts of appeals, U.S. Br. 28—this cost, in itself, does not warrant allowing appeals by parties in Forney's position.

There is a final consideration, which the government astonishingly neglects to mention: requiring parties in Forney's position to return to the agency first accords proper respect to SSA as the instrument of a coordinate branch of government charged by Congress with the responsibility for making social security benefits determinations. As this Court has observed in other contexts, "agencies, not the courts, * * * have primary responsibility for the programs that Congress has charged them to administer," and, thus, "agenc[ies] ought to have an opportunity to correct [their] own mistakes with respect to the programs [they] administer[]" before the federal courts look over their shoulders. *McCarthy* v. *Madigan*, 503 U.S. 140, 144-145 (1992); *accord FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. at 242. Affording SSA the opportunity to correct its mistakes on remand from Section 405(g) judgments setting aside the Commissioner's disability determinations advances this important institutional interest; subjecting SSA to a second round of what may very well be entirely unnecessary federal court review plainly does not.

This is all the more reason to adhere to the settled rules governing the review of judgments in other civil

actions, and to hold that parties in Forney's position may not appeal prior to taking advantage of the remand they have won.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

ALLEN R. SNYDER
(Amicus Curiae, invited by Court, per Order of January 26, 1998)
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

ADDENDUM

42 U.S.C. 405(g) provides:

> [1] Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business, within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. [5] The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with

such regulations and the validity of such regulations. [6] The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commisssioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office. [(Bracketed numerals added.)]